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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~240~~. 24

PULLMAN'S PALACE CAR COMPANY, APPELLANT,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, AND THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED JUNE 17, 1882.

a UNITED STATES OF AMERICA,
Eastern District of Missouri, } ss:

In the Circuit Court of the United States in and for said District.

Be it remembered that on the 13th day of January, A. D. 1882, at a regular stated term of the circuit court of the United States, in and for the eastern district of Missouri, the following, among other proceedings, were had and appear of record, to wit:

b PULLMAN'S PALACE CAR COMPANY, Complainant:
vs.
MISSOURI PACIFIC RAILWAY COMPANY *et al*, Defendants:

On motion of complainant it is ordered that complainant's bill may be, without prejudice to existing orders, amended in the particulars as set forth in the amended bill this day filed.

Thereupon said amended bill is filed.

Said amended bill is in words and figures following, to wit:

1 UNITED STATES OF AMERICA,
Eastern District of Missouri, } ss:

In the Circuit Court of the United States in and for the said Eastern District of Missouri.

To the honorable the judges of said circuit court, in chancery:

The Pullman's Palace Car Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and a citizen of said State, brings this its bill against the Missouri Pacific Railway Company, a corporation organized and existing under the laws of the State of Missouri, and against the St. Louis, Iron Mountain and Southern Railway Company, a corporation organized and existing under the laws of the State of Missouri, and both being citizens of said State of Missouri.

And thereupon your orator complains and says, that it was incorporated by a public act of the Legislature of the State of Illinois, approved the 22nd day of February, A. D. 1867, and to which act of said Legislature reference is hereby made, for the purpose and with power, among other things, to manufacture, construct and purchase railway cars, with all convenient appendages and sup-
2 plies for persons traveling therein, and the same to sell or use, or permit to be used in such manner, and upon such terms, as the said company may think fit and proper; that it is now, and has been for a long time past, and was prior to the year 1877, engaged in the business of manufacturing railway cars, known as drawing-room cars and sleeping cars, under certain patents belonging to it, and of hiring or otherwise arranging with railway companies to use the same under written contracts, for a term of years—said cars to be used and employed on and over the lines of road of said railroad companies, and this company receiving therefor income and revenue under its said arrangements with said railway companies, by the sale to passengers on said railways of seats, berths and

accommodations in said cars; that in the course of its business, and in the performance of its contracts so made under its said charter, it has constructed such drawing-room and sleeping cars as aforesaid in large numbers, expending thereon large sums of money, and making a great investment of capital therein.

That the said St. Louis, Iron Mountain & Southern Railway Company is now, and has been for many years past, engaged in the use of your orator's cars, such as aforesaid, upon its passenger trains, using and employing the same under the terms and provisions of the contract made between your orator and the St. Louis, Iron Mountain Railway Company, bearing date the 20th day of November, A. D. 1871, and which said contract provided that it should continue in force for ten years, and until, to wit, the 20th day of November, 1881, to which said contract, now in the possession of your
3 orator, and ready to be produced as this court may direct, your orator prays leave for greater certainty and particularity to refer.

That the said Missouri Pacific Railway Company is now, and was in the year 1877, the owner of a line of railroad extending from St. Louis, in the said State of Missouri, to Kansas City, on the western boundary of the same State; that in the course of the development of railway travel, it has, and had at the time of the making of the contract herein next mentioned, become indispensible in the conduct of the business of a railroad company to run on passenger trains, sleeping, and drawing-room cars with the conveniences usually afforded by such cars for night travel; that in the year A. D. 1877 the said Missouri Pacific Railway Company was desirous of availing itself of the use on and over its lines of road of the cars constructed under the sleeping and drawing-room car patents, then and now the property of your orator, and also of connections by means of said cars with other lines of railway whereon such cars were then operated by your orator, and for said purposes desired your orator to furnish and supply its said lines of road with such cars aforesaid, and thereupon your orator and the said Missouri Pacific Railway Company entered into an agreement in writing, bearing date the 8th day of May, A. D. 1877, in which said contract, which was stated therein to be made between the Missouri Pacific Railway Company, thereinafter called the Railway Company of the one part, and Pullman's Palace Car Company, being your orator, and thereinafter called the Pullman Company of the other part, it was provided and witnessed that the said parties agreed among other things, as follows:

4 That your orator, in consideration of the covenants and agreements of the Railway Company thereinafter mentioned, to be by it kept and performed, agreed with said Railway Company that it would furnish drawing-room cars and sleeping cars, to be used by said Railway Company for the transportation of passengers, sufficient to meet the requirements of travel on and over all its line of railway and on and over all lines of railway which it then controlled, or might thereafter control by ownership, lease, or otherwise.

That in consideration of the use of the aforesaid cars, the Railway

Company agreed to haul the same on the passenger trains on its own line of road, and on all roads which it then controlled, or might thereafter control by ownership, lease, or otherwise; and also on all passenger trains in which it might, by virtue of contract or running arrangements with other roads, have the right to use such cars in such manner as would best accommodate passengers desiring the use of said cars.

That said Railway Company agreed that your orator should have the exclusive right for a term of fifteen years from the date of said contract, to furnish for the use of said Railway Company, drawing-room or parlor and sleeping cars on all the passenger trains of the said Railway Company, and over its entire line of railway, and on all roads which it then controlled, or might thereafter control by ownership, lease, or otherwise, and also on all passenger trains on which it might, by virtue of contracts or running arrangements with other roads, have the right to use such cars; and that it would not contract with any other party to run said class of cars on and over said lines of road during said period of fifteen years.

5 That said contract or agreement also contains many other provisions concerning the care and repair of said cars, and of the carpet, bedding, and upholstering thereof, and concerning the compensation and profit to be derived by your orator from the use of said cars, and concerning the respective undertakings to your orator of said railway company in connection with the repairs, supplies, and arrangements of said cars, and other matters, as in and by said contract, now in the possession of your orator and ready to be produced, as this court may require, and to which, for greater certainty and particularity, your orator prays leave to refer, with like effect as if the same were herein fully set forth, will more fully and at large appear. A copy of said contract, marked "Exhibit A," is hereto attached, and prayed to be taken as part of this bill of complaint.

Your orator further shows that heretofore, on, to wit, at sometime during the summer or autumn, A. D. 1880, and as early as October 7th of said year, said Missouri Pacific Railway Company consolidated with itself certain other companies under the laws of Missouri, retaining its former name; and that said consolidated company assumed all the obligations of the separate consolidating companies, and continued to use and operate the former road, together with the other consolidated lines.

Your orator further shows that from the time of the making of said contract until the present time, your orator and said Railway Company have proceeded in the execution thereof, and that the cars of your orator are now running and being used and employed on the lines of said Railway Company, as provided in said contract; that your orator has kept and performed on its part all the

6 several provisions and agreements entered into by it in said contract, and will continue so to do, and *and* to furnish all cars that may be required under the provisions of said contract.

That as your orator is informed and believes, before the month of December, A. D. 1880, the said Missouri Pacific Railway Company

acquired and became the owner of more than a majority of the stock of said St. Louis, Iron Mountain and Southern Railway Company; that such purchase was made by said Missouri Pacific Railway Company with the intent and purpose of controlling the management and administration of the said St. Louis, Iron Mountain and Southern Railway Company, and for the purpose of subordinating in effect the said St. Louis, Iron Mountain and Southern Railway Company, and the Missouri Pacific Railway Company, to the same management and control, and of running and operating said roads as one line, and in the interest of the Missouri Pacific Railway Company; that on or about the first day of March, A. D. 1881, the present board of directors of said St. Louis, Iron Mountain and Southern Railway Company was elected; that said board of directors was elected by the vote of the shares of stock so purchased and held as aforesaid by the Missouri Pacific Railway Company, or for its use; that on the same day, to wit, on the first day of March, A. D. 1881, was elected the present board of directors of the Missouri Pacific Railway Company, and that the following-named persons were elected members of each of said boards of directors, and still continue to act therein, to wit, Jay Gould, Russell Sage, Sidney Dillon, Thomas T. Eckert, of New York City, and F. L. Ames, of Boston, Massachusetts; that your orator
7 is informed and believes that said persons last named own and control a majority of the stock of the Missouri Pacific Railway Company, and that the other members of said board of directors have but a relatively small substantial interest therein, and by reason of such purchase and ownership of the capital stock of the St. Louis, Iron Mountain and Southern Railway Company by the said Missouri Pacific Railway Company, the said St. Louis, Iron Mountain and Southern Railway Company has, in contemplation of law and in effect, passed uuder the control of the said Missouri Pacific Railway Company, so as to bring the same within the scope and operation of the language used in the first, seventh, and twelfth sections of said contract between your orator and the said Missouri Pacific Railway Company, and which, at the time of the taking of the said contract, related to the lines of railway which the said Missouri Pacific Railway Company then controlled, or might thereafter control, by ownership, lease, or otherwise, which are the same sections, the substance whereof has been hereinbefore set forth; and your orator does in like manner here state that the said Missouri Pacific Railway Company now has and intends to retain, and to maintain the control of the said St. Louis, Iron Mountain and Southern Railway Company, through the instrumentality of said stock so owned by it, as hereinbefore stated, and also has such running arrangements therewith, that under and by virtue of the contract between your orator and the said Missouri Pacific Railway Company, your orator now has, and will continue to have, the exclusive right for the remainder of the time specified in its said agreement with
8 the Missouri Pacific Railway Company to furnish for the use of the said Missouri Pacific Railway Company, and of the said St. Louis, Iron Mountain and Southern Railway Company, all

drawing-room or parlor and sleeping cars used on all the passenger trains of the entire line of railway of both of said roads; and that neither the said Missouri Pacific Railway Company nor the S. Louis, Iron Mountain and Southern Railway Company has any right to contract with any other party than your orator to run said class of cars on and over said line of road during said period of said agreement yet to run.

Your orator further avers that prior to the month of December, 1880, but at what date your orator cannot state with precision, the said Missouri Pacific Railway Company made an arrangement and agreement between itself and the persons who at that time were the holders of all or nearly all the stock of the said St. Louis, Iron Mountain and Southern Railway Company, which agreement was made with the knowledge and co-operation of the directors of said last-mentioned corporation for the transfer of the ownership and control of the franchises, property, and business of said last-named corporation to the said Missouri Pacific Railway Company; and that this should be accomplished by the surrender and transfer to said Missouri Pacific Railway Company of the capital stock of the St. Louis, Iron Mountain and Southern Railway Company, and the issue and delivery in place thereof of the stock of the said Missouri Pacific Railway Company. That in pursuance of said arrangement the said Missouri Pacific Railway Company had at the date aforesaid acquired and become the owner of more than a ma-
9 jority of the stock of the said St. Louis, Iron Mountain and Southern Railway Company. That said acquisition and purchase was made by said Missouri Pacific Railway Company with the intent and for the purpose of acquiring thereby the control of the management of the affairs, property, and business of the said St. Louis, Iron Mountain & Southern Railway Company, and for the purpose on the part of both of said corporations of putting the control of the franchise, property, and business of the said Iron Mountain & Southern Railway Company into the hands of the said Missouri Pacific Railway Company, and of subordinating in effect the roads of both the said corporations to one and the same management and control, namely, that of the said Missouri Pacific Railway Company, and of running and operating said roads as one line, and in the interest of the Missouri Pacific Railway Company and of said St. Louis, Iron Mountain & Southern Railway Company, as a part thereof.

That it was a part of said arrangement and agreement that the stockholders of the said St. Louis, Iron Mountain & Southern Railway Company should not divest themselves altogether of their interest in the franchises, property, and business thereof, but that they should place the same under the control and management of the said Missouri Pacific Railway Company, by the method of the transfer of their stock in said St. Louis, Iron Mountain & Southern Railway Company to the said Missouri Pacific Railway Company, and retain their interest therein by receiving in exchange therefor the stock of the said Missouri Pacific Pailway Company, in the

proportion of three shares of the stock of the Missouri Pa-
10 cific to four shares of said St. Louis, Iron Mountain &
Southern; and it was understood that as a part of said arrangement the stock of said Missouri Pacific Railway Company received in exchange for said stock of said St. Louis, Iron Mountain & Southern would represent in the hands of its holders a combined interest in the properties of both of said corporations; and that the stock of said St. Louis, Iron Mountain & Southern which was by the arrangement aforesaid acquired by the said Missouri Pacific Railway Company should be retained, held, and used by it to control the franchises, property, and business of the said St. Louis, Iron Mountain & Southern Railway Company, in pursuance and execution of the purpose aforesaid, through the authority of the board of directors of said Missouri Pacific Railway Company, and in the interest of all persons so holding as aforesaid stock of the Missouri Pacific Railway Company. That the said arrangement between the said corporations was in pursuance, as aforesaid, of a general purpose to place the affairs aforesaid of said St. Louis, Iron Mountain & Southern Railway Company under the control of the said Missouri Pacific Railway Company, that they might be operated together as one institution as nearly as possible, and was a mode adopted to that end in lieu of various other methods and modes proposed and considered, namely, by consolidation, by lease, and otherwise, as being least subject to objection, based upon considerations of policy or legality.

That during the period aforesaid, to wit, in the month of December, A. D. 1880, and for a period long prior thereto, Jay Gould was
the president of the said Missouri Pacific Railway Company,
11 and Russell Sage, Sidney Dillon, Thomas T. Eckert, and F.
L. Ames were directors therein; that immediately upon the acquisition by said Missouri Pacific Railway Company of the control as aforesaid of the affairs of the said St. Louis, Iron Mountain and Southern Railway Company, and in the exercise of the control of said Missouri Pacific Railway Company, proceeded to put the persons who were charged with the management of the affairs of the Missouri Pacific Railway Company into the actual control and management of the franchises, property, business, and road of the said St. Louis, Iron Mountain and Southern Railway Company. That on the twenty-second day of December Mr. Lowry, then a member of the board of directors of the said St. Louis, Iron Mountain and Southern Railway Company, at a meeting of said board, nominated the following persons for future election as directors of said company, namely: Jay Gould, Russell Sage, Sidney Dillon, and Frederick L. Ames. That on the thirty-first day of December, A. D. 1880, one W. M. Senter, a member of the board of directors, resigned, and, on motion of Mr. Terry, Jay Gould was unanimously elected to fill said vacancy.

Thereupon one John R. Lionberger, another of said directors, resigned; whereupon, on motion of Mr. Terry, Mr. Sidney Dillon was unanimously elected a director to fill said vacancy. Thereupon one George S. Drake, another director, resigned, and on motion Mr.

Russell Sage was unanimously elected a director to fill said vacancy. Thereupon one R. A. Edgerton, one of said directors, resigned, and on motion Mr. F. L. Ames was unanimously elected a director to fill said vacancy. That on the twenty-second day of January,
12 1881, Mr. Delano resigned as a member of the executive committee of said board, and Jay Gould was appointed a member of said committee in his place. That on the same date Thomas Allen, the president, and W. R. Allen, the vice-president, resigned the said offices and their places as directors in said board, and Thomas T. Eckert and R. C. Kerens were subsequently elected to fill said directory vacancies; and at the annual election held at the stockholders' meeting, on the —— day of March, A. D. 1881, each of the persons above stated to have been appointed directors were elected as members of the board, chosen at that stockholders' meeting. That at the time of said stockholders' meeting the said Missouri Pacific Railway Company held and controlled, as your orator is informed and believes, one hundred and forty-eight thousand and sixty-seven shares of the capital stock of the said St. Louis, Iron Mountain and Southern Railway Company, being, as your orator believes, more than two-thirds of the whole of said capital stock. That at the first meeting of the directors then elected, Henry G. Marquand and Thomas D. Eckert were, on motion of Jay Gould, elected president and vice-president, respectively, and R. S. Hayes was elected as a director to fill a vacancy in said board caused by resignation. That subsequently said Marquand resigned the office of president, and said Jay Gould was immediately elected in his place, he being then the president also of the said Missouri Pacific Railway Company.

That on or about the first day of March, A. D. 1881, the board of directors of the Missouri Pacific Railway Company elected and appointed the following executive committee, to wit: Jay Gould, Russell Sage, Sidney Dillon, Samuel Sloan, and
13 Thomas T. Eckert; that on the same day and at the same meeting said board of directors passed a resolution empowering the president of the said company, to wit, Jay Gould aforesaid, to do and perform all the acts and things necessary to enable the Missouri Pacific Railway Company to acquire by lease, purchase, consolidation with itself or otherwise, the railways, rights of way, real estate, franchises, and other property of certain named railway companies, and of such other railways and railroad companies as might be deemed expedient, upon such terms and conditions as he might deem best, and to such ends to make, enter into, and execute for and in the name of the Missouri Pacific Railway Company any and all contracts, agreements, deeds, and other instruments necessary or proper in the premises; and your orator avers that in and by said language was contemplated directly the acquisition of the complete control and management of the said St. Louis, Iron Mountain and Southern Railway Company, and the formal authorization and adoption of all the acts and proceedings theretofore done and had to that end, as above recited, by the officers and agents of the said Missouri Pacific Railway Company and by the officers and

stockholders of the said St. Louis, Iron Mountain and Southern Railway Company.

Your orator further avers that before the fourth day of May, A. D. 1881, more than a majority of the capital stock of the St. Louis, Iron Mountain and Southern Railway Company had been, in pursuance of the arrangement and agreement hereinbefore stated, and in the exercise of the powers conferred as aforesaid upon the president of the said Missouri Pacific Railroad Company, Jay
14 Gould, surrendered and transferred to the Missouri Pacific Railway Company in exchange for shares of the capital stock of the said Missouri Pacific Railway Company owned by the corporation. That in pursuance of the purpose of the said corporations above stated, it was desired that all of said St. Louis, Iron Mountain and Southern stock should be surrendered in like manner and transferred to the said Missouri Pacific Railway Company.

That on the fourth day of May aforesaid, A. D. 1881, on motion of Russell Sage, seconded by Thomas T. Eckert, the following resolution was offered and unanimously adopted:

"Whereas the holders of a majority in interest of the capital stock of the St. Lous, Iron Mountain and Southern Railway Company have agreed to exchange the same for the shares of the Missouri Pacific Railway Company at the rate of three shares of the Missouri Pacific Railway Company's stock for four shares of Iron Mountain Railway Company's stock; and whereas it is for the interest of both roads to have the remaining outstanding stock exchanged on the same terms: Therefore be it resolved, That this exchange be approved by the Missouri Pacific Railway Company, and the exchange made as speedily as possible, and that the option to exchange be extended to holders of Iron Mountain stock on the same terms for ten days from this date."

That immediately thereafter, and in pursuance of said resolution and of the authority conferred as aforesaid upon the president of said Missouri Pacific Railway Company, and in order to carry into full effect and completion the purpose hereinbefore stated, by acquisition as aforesaid of all the stock of said St. Louis, Iron Mountain and Southern Railway Company, an advertisement was in
15 pursuance of said resolution, dated the fourth day of May aforesaid, and in the exercise of the authority vested in the president of said Missouri Pacific Railway Company, published in The World, a newspaper printed in the city of New York, and in various other leading newspapers published in said city, which said notice was signed by the secretary and treasurer of said Missouri Pacific Railway Company, in the words and figures following, to wit:

"OFFICE OF THE MISSOURI PACIFIC RAILWAY COMPANY,
"78 BROADWAY, NEW YORK, *May* 4, 1881.

"The holders of a majority in interest of the capital stock of the St. Louis, Iron Mountain and Southern Railway Company having agreed with the Missouri Pacific Railway Company to sell their shares, receiving pay therefor in full-paid stock of the Missouri

Pacific Railway Company, at the rate of three shares of the Missouri Pacific for four shares of the Iron Mountain; and the Missouri Pacific Railway Company having agreed to make the purchase of the Iron Mountain shares on the said terms:

"Now, notice is hereby given to the holders of the capital stock of the St. Louis, Iron Mountain and Southern Railway Company that the certificates for the shares of stock in said company can be presented at the office of the Missouri Pacific Company, and the holders thereof will thereupon be entitled, conformably to the agreement aforesaid, to receive therefor full-paid stock of the Missouri Pacific Railway Company at the rate of three shares of the Missouri Pacific Railway Company for four shares of the St. Louis, Iron Mountain and Southern Railway Company, up to and including the fifteenth day of May, 1881.

"A. H. CALEF,
"*Secretary and Treasurer.*"

16 Your orator further avers that the board of directors of the said St. Louis, Iron Mountain and Southern Railway Company recognized the authority and control of the said Missouri Pacific Railway Company over the franchises, property, and business of the said St. Louis, Iron Mountain and Southern Railway Company, and the accomplishment of the purpose to that end hereinbefore cited and set forth, and that in accordance with such recognition the various resignations, elections, and changes in said board hereinbefore stated took place.

Your orator further avers, that in pursuance of said advertisement so published as aforesaid, in accordance with the resolution of said board of directors, passed as aforesaid on the fourth day of May, A. D. 1881, nearly all the remaining stockholders of the said St. Louis, Iron Mountain and Southern Railway Company, concurring in the purpose and policy thereby indicated and proclaimed, transferred their stock to the said Missouri Pacific Railway Company in exchange for capital shares in the stock of said company, owned and issued by said company. So that in the month of October, and as your orator believes, at a period far antecedent to that date, it had come to pass that the said Missouri Pacific Railway Company was the holder and owner absolutely in its corporate capacity of two hundred and eighteen thousand eight hundred and eighty-eight shares of the capital stock of the said St. Louis, Iron Mountain and Southern Railway Company, while the whole capital stock of said company was but two hundred and twenty thousand six hundred and eighty-two and 66-100 shares, leaving only seventeen hundred and ninety-four and 66-100 shares outstanding in the hands of
17 other persons than the said Missouri Pacific Railway Company; and that of said shares so outstanding there were held by the directors and officers of said St. Louis, Iron Mountain & Southern Railway Company, by F. L. Ames, fifty shares; by Sidney Dillon, fifty shares; by Thomas T. Eckert, one hundred shares; by Jay Gould, one hundred shares; by R. S. Hayes, vice-president, one hundred shares; by J. S. Lowry, one hundred shares; by Russell

Sage, one hundred shares; by Samuel Shethar, one hundred shares; by Henry Whelan, fifty shares; by H. G. Marquand, the president of said company, eleven shares; by R. J. Lackland, ten shares, and by R. C. Kerens, seven shares, being seven hundred and seventy-eight shares out of the number of shares so remaining outstanding as aforesaid.

Your orator avers that since the acquisition of said control as aforesaid of said Missouri Pacific Railway Company of all the franchises, property, and the business of the said St. Louis, Iron Mountain and Southern Railway Company, the general officers of of the said Iron Mountain and Southern have one after another retired, and their places have been filled with the same persons who hold and held the corresponding positions in the management of the said Missouri Pacific Railway Company. That some time in March, A. D. 1881, by resolution of the board of directors of the said St. Louis, Iron Mountain and Southern Railway, it was resolved that Mr. Hayes be designated the first vice-president, and that he be clothed with full authority in all matters relating to the management and operating of the property and the general supervision of the company's affairs at the West; and your orator avers that at the
18 same time the said Hayes was like first vice-president, with like powers, of said Missouri Pacific Railway Company, and that the general offices of the St. Louis, Iron Mountain and Southern Railway Company have been everywhere abandoned and closed, and their business has been transferred to the offices of the said Missouri Pacific Railway Company; and in every respect there has been effected and brought about a complete absorption of the said St. Louis, Iron Mountain and Southern Railway Company, and a complete amalgamation of the said two companies, so far as the actual conduct and administration of their business is concerned; and it is arranged and made a part of the law of the said Missouri Pacific Railway Company that the management of the affairs of said Missouri Pacific Railway Company, and consequently the voting of said stock, shall be determined and controlled by its board of directors, and thereby is upheld and perpetuated the control of the said Missouri Pacific over the affairs of the said Iron Mountain. And the said St. Louis, Iron Mountain and Southern Railway Company has in its franchises, property, and business in contemplation of law, and in the intention of the parties, and in fact passed under the control of the said Missouri Pacific Railway Company, within the scope and operation of the language used in the first, seventh, and twelfth sections of said contract between your orator and the said Missouri Pacific Railway Company.

Your orator further shows that its contract with the St. Louis and Iron Mountain Railway Company, hereinbefore set forth was in force and operation at the time of the making of the contract aforesaid with the Missouri Pacific Railway Company, and at the time of the purchase of said
19 stock of said St. Louis, Iron Mountain and Southern Railway Company by said Missouri Pacific Railway Company; that said St. Louis, Iron Mountain and Southern Railway Company has

continued hitherto to operate its cars under said contract, but that said contract would, by its terms, have expired on the 20th day of November, A. D. 1881; that your orator had been lately, and within a few days previous to said date of expiration, notified by Henry G. Marquand, the president of said St. Louis, Iron Mountain and Southern Railway Company, that the right of your orator to operate its business over the road of the St. Louis, Iron Mountain and Southern Railway Company is not conferred by the said contract with the Missouri Pacific Railway Company; and that your orator's right to operate said business is denied by said St. Louis, Iron Mountain and Southern Railway Company; and the said railroad company had given notice to your orator that it would cease to operate its railroad with the cars of your orator after the twentieth day of November, A. D. 1881.

Accordingly, such controversy having arisen between the parties aforesaid as to their respective rights, and negotiations being pending between them, in the hope of a common understanding and of an amicable adjustment of their relations, a further and supplemental agreement was made between the parties, bearing date the tenth day of November, 1881, whereby it was agreed that the said railroad company should continue to operate its road with the cars of your orator until the fifteenth day of December, 1881, as it had theretofore done, and on the same terms, and that pending such negotiations the rights of both parties should remain as at the
20 date of said agreement, as by a copy of which said supplemental agreement hereto attached, marked "Exhibit B," and made a part of this bill of complaint, and to which reference is hereby made, will more fully and at large appear.

Accordingly, your orator shows that the officers and agents, both of said St. Louis, Iron Mountain and Southern Railway Company and of said Missouri Pacific Railway Company have refused to your orator to recognize your orator's right to operate its said cars over the line of the said St. Louis, Iron Mountain and Southern Railway Company after the expiration of its existing contract with said railroad company, now to expire on the fifteenth day of December, A. D. 1881, as above set forth; and that they do publicly declare that the said St. Louis, Iron Mountain and Southern Railway Company will, by contract with others than your orator, engage for use on its said road, on and after the said fifteenth day of December, A. D. 1881, other and different drawing-room and sleeping cars than those of your orator, and your orator has reason to believe, and does believe and fear, that on and after the said fifteenth day of December, A. D. 1881, the cars of your orator will be put off the line of the said St. Louis, Iron Mountain and Southern Railway Company and their use discontinued, and the cars of persons other than your orator substituted therefor in the operation of the business of said road, in violation of the express terms and provisions of the contract of your orator with the said Missouri Pacific Railway Company, hereinbefore set forth.

Your orator further shows that the refusal to operate your orator's cars upon the said St. Louis, Iron Mountain and South-

21 ern Railway, and the denial of your orator's right as aforesaid, is a plain and palpable violation of the provisions of the contract between your orator and said Missouri Pacific Railway Company; that such contract cannot be violated without the greatest and most irreparable damage to your orator; that the cars constructed for the operation of your orator's business are of a very costly sort; that your orator has invested a very large capital in the construction and operation of said cars; that the business of your orator, under its charter, and for which it is incorporated, is of such a nature that it can be transacted only through the instrumentality of contracts of the character herein set forth with railroad companies engaged in the business of running railway passenger trains; that by means of such contracts it can run through cars between remote points and over distances far greater than the length of the separate lines of road, to the great convenience of the public; and that the upholding and enforcement of such contracts is of vital importance and relation to the exercise of the corporate franchises of your orator, and to the public convenience; that if said contracts can be violated as is threatened in the matters hereinbefore stated, the facilities of through travel aforesaid will be broken up, and the property and estate of your orator, to the extent of very many thousands of dollars, which largely exists and inheres in such contracts, will be destroyed in value, and the corporate franchises of your orator practically destroyed; that by reason of the magnitude of the investment as aforesaid, and the cost of operating such cars, your orator cannot receive a fair return, unless it can have the exclusive operation of said business as provided in said con-
22 tracts, with the several companies over whose roads it operates, and that the exclusive right bargained for, and obtained by your orator in said contracts, as in the contract hereinbefore mentioned, is not only reasonable but absolutely necessary for the success of your orator's business, without which your orator could not make desirable contracts, and would not have made the agreement with the said Missouri Pacific Railway Company hereinbefore mentioned.

Your orator further shows that in making the contract hereinbefore set forth with said railroad companies, and in making the provisions therein contained, for the extension of the operation of your orator's cars upon such roads as should come within their control, it has had in contemplation the growth and development of the business, which in the performance of said contract for many years past, it has been building up and developing in the region of country through which the said lines of railway hereinbefore mentioned run; that said business has been largely built up and developed by the efforts and instrumentality of your orator; that in the hope and prospect of its future development, your orator has borne the burden of sustaining and upholding it, when the business was comparatively small and unremunerative; and that it will be a gross injustice and inequity to permit said railroad companies, by violation of

contract, as aforesaid, to remove at the present time the cars of your orator from the line of the said St. Louis, Iron Mountain and Southern Railway Company, or to discontinue operating them thereon, or to substitute the cars of any other party thereon,

23 Forasmuch therefore, as your orator is without remedy, except in a court of equity, where matters of this nature are properly cognizable and relievable, your orator prays that the said Missouri Pacific Railway Company and the said St. Louis, Iron Mountain and Southern Railway Company may be required to answer this bill without oath, their oath thereto being waived; and that they and each of them may be enjoined and restrained from discontinuing the use and employment of the cars of your orator on or after the said 15th day of December, A. D. 1881, over the line of said St. Louis, Iron Mountain and Southern Railway Company, and from refusing to haul the cars of your orator upon any of the passenger trains contemplated and referred to in and by said contract, and from refusing to keep for sale, and to sell at their ticket offices tickets for the accommodations furnished upon your orator's cars, as provided in said contract, and from making or entering into any contract or agreement with any persons other than your orator for the supplying of drawing-room and sleeping cars for use upon the lines of said St. Louis, Iron Mountain and Southern Railway Company, and from permitting any other person than your orator to engage upon said line of road in the business of furnishing such cars as aforesaid, for the use of said road, and from hauling such cars for any other person than your orator upon any of the trains of the said St. Louis, Iron Mountain and Southern Railway Company, and from selling, offering for sale, or allowing to be sold at the ticket offices or other places under the control of the said railway company, the tickets of any other person than your orator for the accommodation of drawing-room and sleeping cars oper-

24 ated on said road, and from transacting and operating upon the said road the business of drawing-room and sleeping cars or other cars of the sort contemplated by the contract aforesaid with the said Missouri Pacific Railway Company, except in accordance with the provisions of said contract with your orator, and from violating any of the covenants or agreements in said contract contained; and for such other and further or different relief as the nature of the case may require and may be agreeable to equity.

And that in the meantime, and until the further order of this court, a preliminary injunction may issue, and that a writ of subpœna may issue out of this court, to be directed to the said Missouri Pacific Railway Company and the said St. Louis, Iron Mountain and Southern Railway Company, commanding them, and each of them, to appear and answer this bill, and to abide the order and decree of this court in accordance with the rules and practice of this court, and that upon a final hearing of this cause a perpetual writ of in-

junction mey issue as above prayed, and for such other or further relief as to your honor may seem meet.

And your orator will ever pray, &c.

[SEAL.] PULLMAN'S PALACE CAR COMPANY,
By GEO. M. PULLMAN, *President.*

Attest: A. S. WEINSHEIMER, *Secretary.*

NOBLE & ORRICK, *Solicitors.*

EDWARD S. ISHAM,
O. A. LOCHRAINE,
JOHN W. NOBLE,
Of Counsel.

25 STATE OF ILLINOIS, } ss:
County of Cook, }

I, George M. Pullman, being duly sworn, state on oath: That I am president of Pullman's Palace Car Company, and authorized to file the foregoing bill of complaint; that I have read the said bill, and that the matters and things therein stated are true of my own knowledge, except such matters as are therein stated on information and belief, and as to those matters I believe them to be true.

GEO. M. PULLMAN.

Subscribed and sworn to before me, this tenth day of December A. D. 1881.

[SEAL.] WILLIAM L. GRASS,
Notary Public, Cook County, Illinois.

Jurat to Amendments to Bill of Complaint.

STATE OF MISSOURI, *City of St. Louis.*

I, John C. Orrick, being duly sworn, state on oath: That I am one of the solicitors of the complainant; that I have read the foregoing amendment to the bill of complaint filed in this case, and that the matters and things in said amendment stated are true of my own knowledge, except such matters as are therein stated on information and belief, and as to those matters I believe them to be true.

JOHN C. ORRICK.

Subscribed and sworn to before me, this 30th day of January, A. D. 1882.

[SEAL.] THOS. L. CRAWFORD,
Notary Public.

26 EXHIBIT A.

This indenture, made this 8th day of May, A. D. 1877, between the Missouri Pacific Railway Company, hereinafter called the Railway Company, of the one part, and Pullman's Palace Car Company, hereinafter called the Pullman Company, of the other part.

Whereas the Pullman Company is now engaged in the business of manufacturing railway cars known as drawing-room cars and

sleeping cars, under certain patents belonging to it, and of hiring the same to railroad companies under written contracts for a term of years, to be used and employed on and over the lines of the roads of said railway companies, and receiving therefor income and revenue by the sale to passengers of seats, berths, and accommodations therein;

And whereas the Railway Company is desirous of availing itself of the use on and over its lines of road of the cars constructed under the sleeping and drawing-room car patents, now the property of the Pullman Company; and also of connections by means of said cars with other lines of railway whereon said cars are now operated for the Pullman Company:

Now this contract witnesseth:

First. That the Pullman Company, in consideration of the covenants and agreements of the Railway Company, hereinafter mentioned to be by it kept and performed, hereby agrees with the Railway Company, that it will furnish drawing-room cars and sleeping cars, to be used by the Railway Company for the transportation of pas-
27 sengers, sufficient to meet the requirements of travel on and over its line of railway, and on and over all lines of railway which it now controls or may hereafter control by ownership, lease, or otherwise, said cars to be satisfactory to the general manager or superintendent of the Railway Company; the cars so furnished to be in part the cars now operated on the lines of the Railway Company, namely, the Genoa, Adriatic, Merrimac, Patuxent, Calabria, Bothnia, and Kenilworth. The Pullman Company agrees that the style and character of the cars furnished at all times shall be equal to any sleeping cars running to Chicago or St. Louis.

Second. The Pullman Company hereby agrees that it will keep the carpets, upholstery, and bedding of each of thesaid cars in good order and repair, and renew and improve the same when necessary, at its own expense, excepting repairs and renewals made necessary by accident or casualty; it being understood that the Railway Company shall repair all damages to said cars, of every kind, occasioned by accident or casualty during the continuance of this contract.

Third. The Pullman Company hereby agrees, at its own cost and expense, to furnish one or more employes, as may be needful, upon each of said cars, whose duty shall be to collect fares for the accommodations furnished in said cars, and generally to wait upon passengers therein and provide for their comfort.

Fourth. The Railway Company hereby agrees that the general officers of the Pullman Company and the employes named in article third of this agreement, shall be entitled to free passage over the lines of the Railway Company when they are on duty for the Pull-
man Company.

28 Fifth. The Pullman Company hereby agrees that the general officers of the Railway Company shall be entitled to free passes in any of the cars furnished by the Pullman Company under this contract.

Sixth. It is hereby mutually agreed that the said employés of the Pullman Company named in article third of this contract shall be

governed by and subject to the rules and regulations of the Railway Company, which are or may be adopted from time to time for the government of its own employés, and in the event of any liabilities arising against the Railway Company for personal injury, death, or otherwise, of any employés of the Pullman Company, it is hereby distinctly understood and agreed that the Railway Company shall be liable only to the same extent it would be if the person was an employé in fact of the Railway Company, and for all liabilities in excess thereof, shall be indemnified and paid by the Pullman Company.

Seventh. In consideration of the use of the aforesaid cars, the Railway Company hereby agrees to haul the same on the passenger trains on its own line of road, and on all roads which it now controls or may hereafter control by ownership, lease, or otherwise; and also on all passenger trains in which it may by virtue of contracts, or running arrangements with other roads, have the right to use such cars, in such manner as will best accommodate passengers desiring the use of said cars.

And the Railway Company shall, at its own expense, keep said cars in good running order and repair, including renewals of
29 worn out parts, and all things appertaining to said cars necessary to keep them in first class condition.

Eighth. And the Railway Company shall, at its own expense, furnish and apply the necessary lubricating material, provide ice, fuel, and material for lights, and shall wash and cleanse said cars; and shall as often as necessary, renew and replace links and pins, bell-cord, and couplings, and couplings for air-brake hose, without charge to the Pullman Company.

But it is hereby understood and agreed that whenever the revenue from sales of seats and berths equals an average of seven thousand five hundred dollars ($7,500) per car per annum upon the whole number of cars operated under this contract, then, while such average annual revenue shall continue, the Railway Company shall not be required to repair any of said cars except such repairs as may be occasioned by accident or casualty, and such as are mentioned in the first paragraph of this article, which shall be made by the Railway Company, as hereinbefere provided. And it is further agreed that if the cars running upon the main line between St. Louis and Kansas City shall at any time earn an average of nine thousand dollars ($9,000) per car per annum upon the average number of cars required to operate said line, then and in that case the Pullman Company shall bear the expense of all the repairs and improvements to said cars during the time that such average annual gross earnings shall continue as aforesaid, except such repairs as are rendered necessary by accident or casualty.

Ninth. The Railway Company agrees to furnish the Pull-
30 man company without charge at convenient points, room and conveniences for airing and storing bedding.

Tenth. The Railway Company further agrees that the Pullman Company shall be entitled to collect from each and every person occupying said cars, such sum for said occupancy as may be usual on competing lines furnishing equal accommodations, and that such

rules and regulations shall be mutually agreed upon as will most favor the renting of seats and berths in said cars.

Eleventh. The Railway Company hereby agrees to permit the Pullman Company to place its tickets for seats and berths for sale in such of the railway ticket offices as may be desired by the Pullman Company, and such services shall be performed by and as a part of the general duties of the ticket agents, and without charge to the Pullman Company; proceeds of such sales to be at the risk of the Pullman Company.

Twelfth. The Railway Company hereby agrees that the Pullman Company shall have the exclusive right for a term of fifteen years from the date hereof, to furnish for the use of the Railway Company drawing-room or parlor and sleeping cars on all the passenger trains of the Railway Company and over its entire line of railway, and on all roads which it controls or may hereafter control by ownership, lease, or otherwise, and also on all passenger trains, on which it may by virtue of contracts or running arrangements with other roads have a right to use such cars, and that it will not contract with any other party to run said class of cars on and over said lines of road during said period of fifteen years.

Thirteenth. The Pullman Company, for the consideration
31 aforesaid, hereby guarantees the railway company against all damages of whatsoever kind which may be by the Railway Company incurred in consequence of any infringement of any patent rights in the construction and use of any of said cars which may be used by the Pullman Company upon the lines of the Railway Company under this agreement; it being the meaning and intent of this article that the Pullman Company shall secure the Railway Company against all manner of expenditures which may be incurred by it in consequence of any litigations connected with alleged infringements of patent rights for the interior arrangements of said cars; and that the Pullman Company will pay off and discharge all judgments obtained at any time against the Railway Company on account of such infringements.

Fourteen. It is mutually agreed between the parties hereto that in case either of said parties shall fail to cleanse or repair, according to the conditions of this agreement, any of said cars, then and in that case, after written notice shall have been given to the defaulting party by the other party of the default complained of, and the said defaulting party shall neglect or refuse so to cleanse or repair said cars within a reasonable time after such notice, the other party shall have the right to cleanse and make, or cause to be made, all necessary repairs and renewals to said cars, and said defaulting party shall pay to the other party the cost of such portion of the cleansing and repairs as said defaulting party is held to be liable for by the terms of this contract.

Fifteenth. It is mutually agreed between the parties hereto that
in case either of said parties shall at any time hereafter fail
32 to keep and perform any of the covenants herein contained to be by them respectively kept and performed, then and in that case, after written notice shall have been given to the default-

ing party hereto of the default complained of, if the said defaulting party shall refuse or neglect to make good, keep, and fulfil such unfulfilled covenants and conditions of this agreement within a reasonable time after such notice, the other party shall be at liberty to declare this contract ended and no longer in force.

Sixteenth. It is mutually agreed between the parties hereto that the Railway Company shall have the option to determine whether it will provide three-fourths or a less proportion of all the capital required for furnishing the equipment which may be put upon the road of the Railway Company under this contract, and upon the payment of the same to the Pullman Company, become a joint owner with the Pullman Company in the said equipment, and receive thereupon three-fourths or a less proportion, as the case may be, of all the gains or profits, and bear the same proportion of all the losses arising from the business of operating the said cars furnished under this contract, the Pullman Company to retain the control and management; provided that such option shall be exercised, if at all, and notice thereof communicated to the Pullman Company, in writing, within five years from the date hereof.

For the purpose of the option hereinbefore last provided, it is hereby mutually agreed that the cars now running on said railroad, and which shall form part of the cars and equipments to be furnished under this contract, together with such additional cars and equipments as may hereafter be assigned to the Railway
33 Company, shall be appraised by competent persons, one to be appointed by the Railway Company and one by the Pullman Company; they two, in case of disagreement, to appoint a third, and the decision of two to be final, and the value fixed by them shall be taken as the value on which the Railway Company shall pay in purchasing its interest in the equipment, in the event of exercising its option.

The taxes upon the cars furnished to the Railway Company by the Pullman Company shall be paid, one-half by the Railway Company and one-half by the Pullman Company.

In witness whereof, the Railway Company has caused its corporate seal to be attached hereto, attested by its president and secretary; and the Pullman Company hath caused its corporate seal to be attached hereto, in like manner, attested by its president and secretary.

Dated the day and year first above written. The words "the Pullman Company agrees that the style and character of cars furnished at all times shall be equal to any sleeping cars running to Chicago or St. Louis," on the first page, were interlined before signing. C. K. G., G. M. P.

MISSOURI PACIFIC RAILWAY COMPANY,
[SEAL.] By C. R. GARRISON, *President.*
Attest: GEO. L. GERAN,
Assistant Secretary.

PULLMAN'S PALACE CAR CO.,
[SEAL.] By GEO. M. PULLMAN, *President.*
Attest: CHAS. W. ANGELL, *Secretary.*

34 EXHIBIT B.

An agreement, made this tenth day of November, eighteen hundred and eighty-one, between the Saint Louis, Iron Mountain and Southern Railway Company, hereinafter called the Railway Company, of the first part, and Pullman's Palace Car Company, hereinafter called the Car Company, of the second part.

Whereas a controversy has arisen between the parties hereto as to the rights of the respective parties under certain contracts, in regard to which controversy negotiations are now pending for a settlement, and the Railway Company has given notice to the Car Company that it will cease to operate its railroad with the cars of the Car Company after the twentieth day of November, 1881:

Now, the parties hereto agree that the Railway Company shall continue to operate its road with the cars of the Car Company until the fifteenth day of December, 1881, as heretofore, and on the same terms; but such operation shall not be deemed or taken as an acquiescence by the Railway Company in the claim of the Car Company.

And it is further agreed that pending such negotiations the rights of both parties shall remain as at the date of this agreement, and nothing shall be done or suffered to the prejudice of either party by the other.

35 UNITED STATES OF AMERICA, } ss.:
Eastern District of Missouri, }

PULLMAN'S PALACE CAR COMPANY, Complainant,
vs.
MISSOURI PACIFIC RAILWAY COMPANY and THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendants.

On reading the annexed bill, it is ordered that the complainant have leave to apply thereunder for an order of temporary injunction, on Wednesday, the 18th day of January, 1882, at chambers at St. Louis, Missouri, before the undersigned, and if possible the district judge also to sit at said hearing, and upon reasonable notice to defendants; and that the complainant have leave to apply for a restraining order upon said bill and affidavits, in the mean time, to either of said judges.

GEO. W. McCRARY,
Circuit Judge.

At Chambers, St. Paul, Dec'r 12, 1881.

Endorsed: Filed Dec'r 22, 1881.

36 In the Circuit Court of the United States, Eastern District of Missouri.

PULLMAN'S PALACE CAR COMPANY
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY and others. } Equity.

Pursuant to leave heretofore granted, on application now made,

it is ordered that the respondents be enjoined and restrained, as in the bill prayed, until the further order of the court, and that the clerk issue a restraining order in due form, upon the execution by complainant of a bond, with the usual condition, in the sum of five thousand dollars, with sureties to be approved by him. The application for injunction to be heard, as heretofore ordered.

GEO. W. McCRARY,
Circuit Judge.

At Chambers, Keokuk, Dec. 22, 1881.

Endorsed: Filed Dec'r 23, 1881.

37 UNITED STATES OF AMERICA, *Eastern District of Missouri:*

Circuit Court of the United States in and for said District.

THE PULLMAN PALACE CAR COMPANY
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY and THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

ST. LOUIS, *December* 23, 1881.

This day comes the complainant, by its solicitors, Messrs. Noble & Orrick, and presents its injunction bond herein, in the penal sum of five thousand dollars, which is approved and filed. And thereupon, on motion of said solicitors, it is ordered that the said defendants, The Missouri Pacific Railway Company and The St. Louis, Iron Mountain and Southern Railway Company, their officers, agents, and employés, and each and every of them, be, and they are hereby, restrained and enjoined, until the further order of this court, from discontinuing the use and employment of the cars of the Pullman's Palace Car Company over the line of the St. Louis, Iron Mountain and Southern Railway Company, and from refusing to haul the cars of said Pullman's Palace Car Company upon any of the passenger trains of said St. Louis, Iron Mountain and Southern Railway Company, and from refusing to keep for sale and to sell at their ticket offices tickets for the accommodation furnished upon said cars, and from making or entering into any contract or agree-
38 ment with any other person than said Pullman's Palace Car Company for supplying drawing-room or sleeping cars for use upon their roads; and from permitting any other person than said Pullman's Palace Car Company to engage upon said line of road in furnishing such cars as aforesaid for the use of said road; and from hauling such cars for any other person than said Pullman Company upon any of the trains of said St. Louis, Iron Mountain and Southern Railway Company; and from selling, or allowing to be sold, at places under the control of either of said defendants tickets of any other person than said Pullman Company for such accommodations; and, further, from transacting or operating upon said road the business of drawing-room or sleeping cars other than with said Pullman's Palace Car Company; and from violating the

agreement between said Car Company with said Missouri Pacific Railway Company.

It is further ordered that a writ of injunction be served on said defendants, in accordance with the terms of this order.

39 U. S. OF AMERICA, *East. Dist. of Mo.:*

In the U. S. C't C't in and for the East. Dist. of Mo.

PULLMAN'S PALACE CAR COMPANY, Complainant,
vs.
MISSOURI PACIFIC RAILWAY COMPANY and ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendants

JAN'Y 30TH, 1882.

On motion of complainant it is ordered herein that complainant's bill may be, without prejudice to existing orders, amended in the particulars, and as set forth in the amended bill this day filed. Thereupon, said amended bill is filed.

A copy. Attest: M. M. PRICE, *Clerk*,
By F. L. CRAWFORD, *D. C.*

40 And afterwards, to wit, on the 6th day of February, A. D. 1882, the following further proceedings were had, and appear of record, to wit:

PULLMAN'S PALACE CAR COMPANY, Complainant,
vs.
MISSOURI PACIFIC RAILROAD COMPANY *et al.*, Defendants. } 1948.

Now come the defendants by their attorneys and file their demurrer to the bill of complaint, and thereupon said demurrer was argued by counsel and submitted.

Said demurrer is in words and figures following, to wit:

41 In the Circuit Court of the United States for the Eastern District of Missouri.

PULLMAN'S PALACE CAR COMPANY, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY and ST. LOUIS IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Respondents.

The respondents, by protestation, not confessing all or any of the matters or things in the said complainant's original and amended bill contained to be true, in such manner and form as the same are therein set forth and alleged, does demur thereto, and for cause of demurrer shows:

1st. That it appears from the statements in said bills of complaint that this court has no jurisdiction of this case.

2d. That the said bills of complaint, nor either one of
42 them, do not state facts sufficient to constitute a cause of action in a court of equity.

3rd. That there is no equity in said bills of complaint, or either of them.

4th. That the complainants have a full, complete, and adequate remedy at law.

JOHN C. BROWN &
THOS. J. PORTIS,
Solicitors for Respondent.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

THOS. J. PORTIS,
Sol. for Resp'd't.

PULLMAN PALACE CAR COMPANY, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY and ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Respondent.

43 CITY OF ST. LOUIS, STATE OF MISSOURI, } *ss:*
United States of America, }

Thomas J. Portis, being duly sworn, upon his oath, says: That he is one of the attorneys of the defendants in aforesaid cause, and that the foregoing demurrer interposed in said cause by defendant was not so interposed for delay.

THOS. J. PORTIS.

Subscribed and sworn to before me, this 6th day of February, 1882.

A. P. SELBY,
U. S. Com'r, E. D. Mo.

44 And afterwards, to wit, on the 25th day of April, A. D. 1882, the following further proceedings were had and appear of record in said cause, to wit:

PULLMAN'S PALACE CAR CO., Plaintiff, }
vs. } 1948.
MISSOURI PACIFIC RAILWAY CO. *et al.*, Defendants. }

The application of plaintiff for a preliminary injunction herein having heretofore been presented and argued by counsel and submitted, and the court being now fully advised in the premises, it is ordered by thecourt that said application be, and it is, denied.

45 And afterwards, to wit, on the 29th day of May, A. D. 1882, the following further proceedings were had and appeared of record in said cause, to wit:

PULLMAN'S PALACE CAR COMPANY, Complainant,
vs.
MISSOURI PACIFIC RAILWAY COMPANY and THE ST. LOUIS IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Respondents. } 1948.

The demurrer of respondents to the amended bill of complaint herein having been heretofore submitted, and the court having considered the same, and being now fully advised in the premises, finds for the respondents on said demurrer; and the complainant electing to abide by its amended bill: Now, therefore, on consideration thereof, it is ordered, adjudged, and decreed that the demurrer herein be, and is, sustained, and the said amended bill of complaint
46 be, and the same is now hereby, dismissed, with costs to the respondent, to be taxed.

And thereupon the complainant, by its solicitors, presents to the court its bond for an appeal from the decree now herein entered, and prays an appeal to the Supreme Court of the United States, and asks that said bond be approved.

Upon consideration whereof, it is ordered that an appeal be, and it is, allowed as prayed, and said bond is approved and ordered to be filed and made part of the record herein.

It is further ordered that a transcript of the record be made by the clerk of this court and transmitted to the Supreme Court of the United States on or before the first day of the next term thereof.

Said appeal bond is in words and figures following, to wit:

47 Know all men by these presents, that we, Pullman's Palace Car Company, as principal, and George A. Baker, as surety, are held and firmly bound unto the Missouri Pacific Railway Company and the St. Louis, Iron Mountain and Southern Railway Company, in the full and just sum of five hundred dollars, to be paid to the said Missouri Pacific Railway Company and the St. Louis, Iron Mountain and Southern Railway Company, their successors, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 29th day of May, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas lately, at the March term, A. D. 1882, of the cir-
48 cuit court of the United States for the eastern district of Missouri, in a suit depending in said court between Pullman's Palace Car Company, plaintiff, and the Missouri Pacific Railway Company and the St. Louis, Iron Mountain and Southern Railway Company, defendants, a decree was rendered against the said Pullman's Palace Car Company, and the said Pullman's Palace Car Company having obtained an appeal of the said court to reverse the decree in the aforesaid suit:

Now, the condition of the above obligation is such that if the said Pullman's Palace Car Company shall prosecute said appeal to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of—

PULLMAN'S PALACE CAR COMPANY, [SEAL.]
By NOBLE & ORRICK, *Att'ys.* [SEAL.]
GEO. A. BAKER. [SEAL.]

Approved by—
SAMUEL TREAT. [SEAL.]

49 On the hearing the following opinion was delivered by Honorable George W. McCrary, circuit judge, on the application for injunction:

Opinion of the Court.

This case is before the court upon an application for a preliminary injunction to restrain respondents from violating a certain contract, and it has been fully argued by counsel, both orally and in print. The facts, so far as we deem it material to state them, are as follows:

On the 8th of May, 1877, a contract, in writing, was entered into between the complainant and the respondent, The Missouri Pacific Railway Company, which gave complainant the exclusive right, for a term of fifteen years, to furnish to the railway company drawing-room and sleeping cars for use upon its railroad, and bound the railway company, upon certain terms and conditions, to haul said drawing-room and sleeping cars over its line of railroad.

The provisions of this contract now to be considered are those by which it was provided that it should include not only the railway then controlled by the Missouri Pacific Railway Co., but also all roads said railway company might thereafter control by ownership, lease, or otherwise. These provisions are to be found in the seventh and twelfth clauses of the contract, which are as follows:

"Seventh. In consideration of the use of the aforesaid cars, the railway company hereby agrees to haul the same on the passenger trains on its own line of road and on all roads which it now controls or may hereafter control by ownership, lease, or otherwise, and also on all passenger trains in which it may, by virtue of contracts or running arrangements with other roads, have the right to use such cars, in such manner as will best accommodate passengers desiring the use of said cars.

"And the railway company shall, at its own expense, keep said cars in good running order and repair, including renewals of worn out parts, and all things appertaining to said cars necessary to keep them in first-class condition.

"Twelfth. The railway company hereby agrees that the Pullman company shall have the exclusive right, for a term of fifteen years from the date hereof, to furnish for the use of the railway company drawing-room or parlor and sleeping cars on all the passenger trains

of the railway company, and over its entire line of railway, and on all roads which it controls, or may hereafter control, by ownership, lease, or otherwise, and also on all passenger trains on which it may, by virtue of contracts or running arrangements with other roads, have a right to use such cars, and that it will not contract with any other party to run said class of cars on and over said lines of road during said period of fifteen years."

The contention of the complainant, which lies at the foundation of its right to an injunction, is that since the execution of the contract the said Missouri Pacific Railway Company has acquired control of the St. Louis, Iron Mountain and Southern railway, so as to bring the line of that road within the terms and subject to the operation of the contract. The facts upon which this claim rests, as they are set forth in the bill, are, in substance, that prior to December, 1880, the Missouri Pacific Railway Company acquired and became the owner of more than a majority of the stock of the St. Louis, I. M. and Southern railway, and that such purchase was made with the intent of controlling the management and administration of the last-named road, and of running the two roads as one line, and in the interest of the Missouri Pacific Railway Company; that the present board of directors of the Iron Mountain Company was elected by the vote of the shares of stock owned by the Missouri Company; that certain persons, seven in number, are members of the board of directors of both companies, and that the same persons are respectively president and vice-president of both companies; that by reason of such purchase and ownership of the capital stock of the Iron Mountain Company by the Missouri Pacific Company, the former corporation has, in contemplation of law and in effect, passed under the control of the latter, so as to bring the same within the scope and operation of the contract above named.

Respondents demur to the bill, and thus admit the averments therein, so far as they are well pleaded, but not the conclusions drawn by the pleader, from the facts stated. The demurrer raises the question whether, upon the facts stated in the bill, the complainant is right in its contention that the Iron Mountain road has passed under the control of the Missouri Pacific Company within the meaning of the contract.

What are we to understand by the word "control," as employed in the contract? The language is, "all roads which it controls or may hereafter control," which, in our judgment, means controlled by the corporation. The language does not refer to the ultimate power of control which always lies in the stockholders, and which may be indirectly exercised by them at stated periods by the election of directors. It means the immediate or executive control which is exercised by the officers and agents chosen by and acting under the direction of the board of directors. Every corporation, whether private, public, or *quasi*-public, has a constituency behind it to which it is responsible, and by which it may in the end be controlled; but when we speak of a corporation in a contract or a statute we do not refer to this constituency, but to the artificial person which acts only

according to its laws and through its agents and officers. Thus, a municipal corporation, as, for example, a city, county, or town, is in one sense composed of all the voters of the municipality; but when it is referred to in a statute or contract, it is always mentioned in its corporate capacity as a single person having certain specified powers, and not with any reference whatever to the body of electors by whom its officers are chosen, and may from time to time be changed. A statute providing that a railway company shall be subject to the control of a county or city would not be construed as having contemplated control by the majority of the voters, nor by all the voters, but by the constituted authorities of such county or city for the time being. The same rule applies to other corporations; and where a contract contemplates corporate action, we must always understand that action by the proper authorities, and not action by the stockholders, is intended. It is conceded in this case that the two corporations continue to exist and to act separately, each through its own agents and officers. There has been no absorption of one by the other. There are still two sets of officers, two boards of directors, and, in fact, two complete corporations. True, it is admitted the same persons are in several instances officers and directors of both companies. But it is difficult to see how this places one corporation under the control of the other. If it does, how are we to determine which is the controlling and which the subordinate company? It may be true that the two companies are acting in harmony, and that the same persons own a majority of the stock of both; but this is something very different from the control of one by the other. It is contended that the owner of the stock, or a majority of it, should be regarded for the purposes of the contract in question as the owner of the railway. But even if this were admitted, it would not avail the complainant. The contract calls for control, not merely ownership. The owners of a railway may not control it. The language of the contract upon this point was, no doubt, carefully chosen, and is several times repeated. The roads to be brought within the terms of the contract were described as "all roads which the railway company now control or may hereafter control by ownership, lease, or otherwise." There must be control, and it may be by ownership, lease, or otherwise, so that the ownership of nearly all the stock is not enough. The court cannot say, as matter of law, that this gives the control which the contract calls for.

The stock of a corporation is constantly changing hands.
51 Before the decree could be executed in this case the stock of the Iron Mountain Company may pass to other hands. The stockholders of to-day may not be the stockholders of to-morrow. Besides, the stockholders of these two companies may, for any reason satisfactory to them, consider it for their interest to continue both corporations in existence, reserving to each all its rights under the law. Their right to do so is clear, and for aught that appears this is precisely what they have done. The purchaser of the majority of the stock of the Iron Mountain Company, although that purchaser was the Missouri Pacific Company, acquired the right to continue the former corporation as a separate and independent body

corporate, and the court cannot compel it to forego that right. Each of these corporations has its own charter or articles of incorporation, its own board of directors and executive officers. They exist under and by virtue of separate and distinct acts of incorporation; and if the Missouri Pacific does not see fit to take the legal control of the Iron Mountain road, the court cannot require it to do so.

I concur in overruling this motion on an injunction. Let this order be so entered.

SAM. F. MILLER, *Circuit Justice.*

52 UNITED STATES OF AMERICA, *Eastern District of Missouri,* } ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record and proceedings in case No. 1948, of Pullman's Palace Car Company, plaintiff, against the Missouri Pacific Railway Company and the St. Louis, Iron Mountain and Southern Railway Company, defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district, this 28th day of June, in the year of our Lord eighteen hundred and eighty-two.

[SEAL.]

M. M. PRICE,
Clerk of said Court.
By A. P. SELBY, *Deputy.*

53 [Endorsed:] United States circuit court, eastern district of Missouri. No. 1948. Pullman's Palace Car Company against The Missouri Pacific Railway Company *et al.* Duly certified transcript in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 240. Pullman's Palace Car Company, appellant, *vs.* The Missouri Pacific Railway Company and The St. Louis, Iron Mountain and Southern Railway Company. Filed 17th July, 1882.

115-5-87

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CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM.—A. D. 1885.

PULLMAN'S PALACE CAR COMPANY

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY ET AL.

Memorandum of certain Authorities cited upon Oral Argument on Behalf of Appellant.

EDWARD S. ISHAM,
Counsel for Appellant.

Supreme Court of the United States,

OCTOBER TERM—A. D. 1885.

PULLMAN'S PALACE CAR COMPANY

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY ET AL.

Memorandum of certain Authorities cited upon Oral Argument On Behalf of Appellant.

The burden of the Bill of Complaint is that the *road* of the Iron Mountain Railway Company has, by virtue of an agreement carried into execution, passed into the actual control of the Missouri Pacific Railway Company, thereby subordinating the roads of both of said corporations to one and the same management and control, namely, that of the Missouri Pacific Railway Company.

In averring this agreement and its execution the bill does not *set out a written contract* and then *aver its meaning*, by construction of its terms. It avers a contract, and the *terms* of the contract are shown *only by the averments* of the bill. Apart from these averments, no contract whatever is set out.

For this reason none of the authorities cited in the brief of appellees are applicable to the present case. They are

to the effect that "averments in a complaint of the *meaning* or contents *of a paper set out therein*" are not admitted by a demurrer. With this we have no controversy, for where a written contract is set out in a bill, its meaning or legal effect will be determined by the Court upon construction of the instrument. The case is not the same where no written contract or paper is set out in the complaint, and the only contract shown appears by the averments of the complaint.

In the present case the following are substantive facts, averred in the bill of complaint:

"FIRST.—An agreement to unite the Iron Mountain Road with that of the Missouri Pacific, under the common management of the Missouri Pacific Railway Company, as a part of one line with its own road.

SECOND.—The massing of all or substantially all the stock of the Iron Mountain Road in the treasury of the Missouri Pacific, and a substitution by exchange of the stock of the Missouri Pacific therefor, as one step taken in carrying that agreement into effect.

THIRD.—"*The purpose on the part of both of said corporations* of putting the control" of the property of the Iron Mountain into the hands of the said Missouri Pacific "and of subordinating in effect the roads of both the said corporations to one and the same management and control," namely, that of the Missouri Pacific.

FOURTH.—The consummation of that intent and purpose; in that immediately upon the acquisition by the Missouri Pacific of the control of the affairs of the Iron Mountain Company, "and in the exercise of the control of said Missouri Pacific Railway Company, *they proceeded to put the persons* who were charged with the management of the affairs of the Missouri Pacific Railway Company, *into the actual control and management* of the franchises, *property*, business *and road* of the Iron Mountain Company."

FIFTH.—The actual fact of the present control and management of the business and road of the Iron Mountain by the Missouri Pacific; that the general offices of the Iron Mountain "have been everywhere abandoned and closed, and their business has been transferred to the offices of the Missouri Pacific, and in every respect there has been effected and brought about a complete absorption of the said St. Louis, Iron Mountain and Southern Railway Company, and a complete amalgamation of the said two companies, so far as the actual conduct and administration of their business is concerned."

These are, each and all of them, several averments of fact. If these averments were traversed, we would be holden to prove the agreement and its execution; but we must prove them by evidence. They could not be proven by inference of law. When proved by the evidence, the case would be in the same situation that it is in now when they are alleged in the bill and admitted on record by the demurrers of both corporations.

And, if the matters averred by these allegations are *true*, will any one say that the Iron Mountain Road is not operated and controlled by the Missouri Pacific? It follows that if these allegations are not to be taken as admitted by the demurrer, the appellees *ought to have traversed them.* In that case we might have gone into evidence to support them, and might have availed ourselves by compulsory disclosure, of evidence which is peculiarly within the possession and control of the appellees. It was not proper to meet such allegations as these, merely by demurrer, and then afterward contend that upon argument of the demurrer they may not be assumed to be true. If they are true the Missouri Pacific controls, in fact, the Iron Mountain road. If their truth is disputed, they ought to have been traversed and not left to be contested on the technical objection that they are not embraced within the admissions of a demurrer.

Such averments, namely, those of an agreement, and of the intention of the parties in what they did, and the consummation of the agreement are strictly questions of fact; and "any material fact which is stated anywhere in the stating part of a bill with legal certainty is well pleaded."

Paterson, &c. R. R. Co. *v.* Jersey City, 9 N. J. Eq. (1 Stockton, 434).

We could not without hesitation enter upon argument to this Court of such a question as what facts may be assumed upon the argument of a demurrer; nor would we, were it not for the fact that counsel have seen fit to rest their case upon so technical an issue, and for the manifest implication, that if the averments of this bill are to be assumed as averments of fact, the claim of the bill could not be resisted if they were traversed.

To the foregoing effect are the following authorities cited to the Court in oral argument.

5 Cranch, 357. "*Intention* is a *fact* which ought to have been averred, for it is the gist of the plea, and would have been traversable." Marshall, *C. J.*

The possession of an *intention*, like the possession of knowledge or of skill, is a fact.

Ram on Facts, page 18.

38 N. Y., 281, Thurston *v.* Cornell. Testimony may be given directly as to the intent with which an act was done when the intent is material to the issue. This related to the intent with which money was paid where the question was one of usury.

That intention is a traversable fact:

See 19 N. Y., 468; 5 Barb., 203; 25 N. Y., 439.

12 N. Y., 538. On question of *merger* of a mortgage estate, it was held that *intention* was a fact to be proven by direct testimony, and *should have been found as a fact* by the Referee, and was wrongly left by him as a conclusion of law. It was held to be a matter of fact upon which the finding of the Referee was necessary, and upon which his finding could not be reviewed by the Court of Appeals.

13 Johns. R., 294. Held that whether a contract for sale was completed was a question of fact.

78 N. Y., 523. Held that the questions of negligence, and of contributory negligence, were questions of fact.

8 Cal., 398, Tuolumne Water Co. *against* Chapman. "A demurrer to prayer for injunction admits the fact alleged that plaintiff has a *right* and the defendant a *fictitious* claim."

U. S. Dig., 10, 248.

These averments, therefore are matters of substantive fact. If the appellees were not to treat them as assumed to be true on demurrer, they ought to have traversed them. If they are true the Iron Mountain road is within the control of the Missouri Pacific. That control, within the meaning of the contract between the appellant and the Missouri Pacific, is any control which can determine what cars shall be operated on that line. The allegations should have been traversed, or should be assumed to be true on the argument of the demurrer; and the objection here insisted upon by appellees is a technical and manifest evasion of the plain allegations of a bill of complaint, which are equally unequivocal in phraseology and in spirit.

EDWARD S. ISHAM,
Counsel for Appellant.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1884.

PULLMAN'S PALACE CAR COMPANY,
Appellant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY AND THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Appellees.

Appeal from the Eastern District of Missouri.

ARGUMENT OF EDWARD S. ISHAM,

COUNSEL FOR APPELLANT.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO.

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1885.

BRIEF.

The case presented on this record is stated as concisely as seems possible to us on the first three pages of the printed argument filed herewith. The contract between the appellant and the Missouri Pacific Railway Company is shown at page 14 of the printed transcript of record.

The appellant assigns for error in the judgment of the court below:

1. That the court erred in the construction of the legal effect of the said contract in not holding that it applied to and included in its operation the railroad of the St. Louis, Iron Mountain & Southern Railway Company.

2. In refusing the relief prayed for by the bill of complaint.

ARGUMENT.

Of the Obligation of the Contract.

Two questions are presented in this record: The first relating to the obligation of a contract, the second to the remedy. The first and general question is whether *the road* of the St. Louis, Iron Mountain and Southern Railroad Company has been transferred *to the management* of the Missouri Pacific Railroad Company, so as to bring it under the obligation of the contract of that company with the appellant. In practical effect this is the only material question between the parties; for if the obligation of the contract be ascertained, it will not be violated, as pending this litigation it has not been violated. Therefore, whether the equitable remedy prayed, or some other form in equity or at law is the appropriate one, is comparatively unimportant, for the material issue is upon the *obligation* asserted by the complainant. Upon this issue the case was determined in the opinion of the circuit judge below.

The contract of the Pullman company with the Missouri Pacific Railroad Company provided that the Pullman company should "furnish drawing-room cars and sleeping "cars, to be used by said railroad company for the trans- "portation of passengers, sufficient to meet the require- "ments of travel on and over all its line of railway, and

"*on and over all lines* of railway which it *then controlled* "or might *thereafter control by ownership, lease, or other-* "*wise.*" And the Missouri Pacific agreed that it would "haul the same on the passenger trains *on its own line* "of road, *and on all roads* which *it then controlled*, or "might thereafter *control by ownership*, lease, *or other-* "*wise;* and also on all passenger trains on which it might, "*by virtue of contracts* or running arrangements with "other roads, *have the right to use* such cars."

A similar contract existed and was in operation between the Pullman company and the St. Louis' Iron Mountain and Southern Railroad Company, and it expired December 15, 1881. (Pr. Rec., 19.)

But before that time the Missouri Pacific had *become the owner* of the Iron Mountain road by the acquisition of substantially all the stock, getting 218,888 shares out of $220,682\frac{6}{100}$; and 788 other shares were held by officers in the same interest. This stock was taken in by the substitution of that of the Missouri Pacific. The act was very nearly in effect a consolidation; for, thereafter, the shares of *Missouri Pacific stock* represented *the combined properties of both corporations*, and the management of both as one line "*through the authority of the board of* "*directors of said Missouri Pacific.*" The purpose of this substitution of stock is set out in the bill; and the case stands on demurrer, so that we look to the bill for the facts in the record. The stock was massed in the treasury of the Missouri Pacific for the purpose of uniting this road and that of the Missouri Pacific, so to make of them *one line* under its exclusive management and control. By the power of this stock

the Missouri Pacific might with equal facility have extinguished the corporation by causing a consolidation with itself; or have taken to itself a *lease* of the property, or a deed of ordinary bargain and sale, leaving the corporation alive. But to avoid conflict with laws that were thought to make these of doubtful legality, a *form* of independent organization was upheld. The Missouri Pacific, however, controlled the composition of the directory of the Iron Mountain, and in fact put its own directors and executive agents into corresponding positions in that road, for the purpose of making its dominion complete and effectual throughout its administration.

In the name of the Iron Mountain notice was given that on the expiration of its own contract, it would no longer allow the Pullman company to operate its cars on that road. On the other hand, the bill of the complainant was filed to assert the right of the Pullman company to operate that road under its contract with the Missouri Pacific, because that road had passed into the control of the Missouri Pacific within the meaning of its contract, and become in substance a part of the line of the Missouri Pacific.

It is to be remembered that the bill avers as the *foundation* fact of this case, not merely the *acquisition* through this stock *of the means of control*, not *a mere power* to control, but that by the use of this power inherent in the stock, and in execution of the purpose for which the stock was placed with it, the Missouri Pacific has *actually taken* into its hands and has *actually assumed the control;* and that notwithstanding the disguise of a separate corporate organization it is managing the road,

itself, by its own agents and employes, as actually as if it held it by a lease or a consolidation.

If the Missouri Pacific has this control—we speak of the control contemplated by the contract—then we are entitled to protection *or* redress.

There are many cases which assert that only the directors control a road, and that stockholders have no power to control or to interfere with them while acting *within their duty* and their power; and ordinarily that is true, where the charter prescribes such mode of action. This is the principle on which the opinion of the circuit judge, filed in the court below, is based, and the following extracts from that opinion are to that effect:

"The provisions of this contract now to be considered are those by which it was provided that it should include not only the railway then controlled by the Missouri Pacific Railway Company, but also all roads said railway company might thereafter control, by ownership, lease or otherwise. These provisions are to be found in the seventh and twelfth clauses of the contract." * * * "The contention of the complainant, which lies at the foundation of its right to an injunction, is that since the execution of the contract the said Missouri Pacific Railway Company has acquired control of the St. Louis, Iron Mountain and Southern railway so as to bring the line of that road within the terms and subject to the operation of the contract." * * * "What are we to understand by the word 'control' as employed in the contract? The language is 'all roads which it controls or may hereafter control,' which in our judgment means controlled by the corporation. The language does not refer to the ultimate power of control which always lies in the stockholders, and which may be indirectly exercised by them at stated periods by the election of directors. It means the immediate or executive control which is exercised by the officers and agents chosen by and acting under the direction of the board of directors. Every corporation, whether private, public or *quasi*-public, has a constituency behind it to which it is responsible, and by which it may in the end be controlled. But when we speak of

a corporation in a contract or a statute we do not refer to this constituency, but to the artificial person which acts only according to its laws and through its agents and officers. Thus a municipal corporation, as for example a city, county or town, is in one sense composed of all the voters of the municipality; but when it is referred to in a statute or contract it is always mentioned in its corporate capacity as a single person having certain specified powers, and not with any reference whatever to the body of electors by whom its officers are chosen, and may from time to time be changed. A statute providing that a railway company shall be subject to the control of a county or city would not be construed as having contemplated control by the majority of the voters, nor by all the voters, but by the constituted authority of such county or city for the time being. The same rule applies to other corporations; and where a contract contemplates corporate action, we must always understand that action by the proper authorities, and not action by the stockholders, is intended." * * * * * * "It is contended that the owner of the stock, or a majority of it, should be regarded for the purposes of the contract in question as the owner of the railway. But even if this were admitted it would not avail the complainant. The contract calls for control, not merely ownership. The owners of a railway may not control it. The language of the contract upon this point was no doubt carefully chosen, and is several times repeated. The roads to be brought within the terms of the contract were described as 'all roads which the railway company now control or may hereafter control by ownership, lease or otherwise.' There must be control, and it may be by ownership, lease or otherwise, so that the ownership of nearly all the stock is not enough. The court can not say as a matter of law that this gives the control which the contract calls for." * * * * "Each of these corporations has its own charter or articles of incorporation, its own board of directors and executive officers. They exist under and by virtue of separate and distinct acts of incorporation; and if the Missouri Pacific does not see fit to take the legal control of the Iron Mountain road, the court cannot require it to do so."

In this, the circuit judge appears to deal solely with one phase of the subject, and one quite different from that we sought primarily to present by this bill of com-

plaint. For example he states our position accurately, when he says that the contract calls for *control* and not *ownership merely;* that it refers to *control* by ownership, lease or otherwise; but he has certainly ceased to deal with the real burden of the bill when he gives emphasis to this, that the *mere ownership* of nearly all the stock is not enough, that the court cannot say as matter of law that this gives the *control* which the contract calls for, and that *if* the Missouri Pacific *does not see fit to take* the control of the Iron Mountain road, *the court cannot require it to do so*, and turns the case upon that.

It is precisely the *fact* that that company *has taken* this *actual control* by ownership, or at least by ownership and '*otherwise*,' which is the *averment and the burden* of the bill itself.

In this connection we ask the attention of the court to what the averments of this bill are, concerning this matter, and also concerning this "control," by ownership or otherwise.

"Your orator further avers that prior to the month of December, 1880, but at what date your orator cannot state with precision, the said *Missouri Pacific Railway Company* made an arrangement and agreement between itself and the persons who at that time were the holders of all or nearly all of the stock of the said St. Louis, Iron Mountain and Southern Railway Company, which agreement was made *with the knowledge and co-operation of the directors* of said last mentioned corporation *for the transfer of the ownership and control of the franchises, property and business of said last named corporation to the said Missouri Pacific* Railway Company; and *that this should be accomplished by the surrender and transfer* to said Missouri Pacific Railway Company *of the capital stock of the St. Louis, Iron Mountain and Southern* Railway Company, and *the issue and delivery in place thereof of the stock of the said Missouri Pacific* Railway Company. * * * That said acquisition and purchase was made by said Missouri Pacific Railway Com-

pany *with the intent and for the purpose of acquiring thereby the control of the management of the affairs, property and business* of the said St. Louis, Iron Mountain and Southern Railway Company, and *for the* PURPOSE ON THE PART OF BOTH of said CORPORATIONS of *putting the control* of the franchises, *property and business* of the said Iron Mountain and Southern Railway Company into the hands of the said Missouri Pacific Railway Company *and of subordinating in effect the roads of both the said corporations to one and the same management and control*, namely that of the said Missouri Pacific Railway Company and *of running and operating said roads as one line*, and in the interest of the Missouri Pacific Railway Company and of said St. Louis, Iron Mountain and Southern Railway Company *as a part thereof.*

"That it was a part of said arrangement and agreement that the stockholders of the said St. Louis, Iron Mountain and Southern Railway Company should not divest themselves altogether of their *interest* in the franchises, property and business thereof, but that they *should place the same under the control and management of* the said Missouri Pacific Railway Company *by the method of the transfer of their stock* in said St. Louis, Iron Mountain and Southern Railway Company to the said Missouri Pacific Railway Company. * * * It was understood that as a part of said arrangement the stock of said Missouri Pacific Railway Company received in exchange for said stock of said St. Louis, Iron Mountain and Southern *would represent in the hands of its holders a combined interest in the properties of both of said corporations*, and that the stock of said St. Louis, Iron Mountain and Southern which was by the arrangement aforesaid acquired by the said Missouri Pacific Railway Company *should be retained, held and used by it to control the franchises, property and business* of the said St. Louis, Iron Mountain and Southern Railway Company *in pursuance and execution of the purpose aforesaid*, THROUGH THE AUTHORITY OF THE BOARD OF DIRECTORS OF SAID MISSOURI PACIFIC *Railway Company*, and in the interest of all persons so holding as aforesaid stock of the Missouri Pacific Railway Company. That the said arrangement between the said corporations was in pursuance, as aforesaid, of a general purpose to place the affairs aforesaid of said St. Louis, Iron Mountain and Southern Railway Company *under the control of the said* Missouri Pacific Railway Company *that they might be operated together as one institution* as nearly as possible *and was a mode adopted to that end in lieu of various other methods and modes proposed*

and considered, namely by consolidation by lease and otherwise, as being least subject to objection based upon considerations of policy or legality.

"That during the period aforesaid, to wit, in the month of December, A. D. 1880, and for a period long prior thereto, Jay Gould was the president of the said Missouri Pacific Railway Company, and Russel Sage, Sidney Dillon, Thomas T. Eckert and F. L. Ames were directors therein; that immediately upon the acquisition by said Missouri Pacific Railway Company of the control, as aforesaid, of the affairs of the said St. Louis, Iron Mountain and Southern Railway Company, and in the exercise of the control of said Missouri Pacific Railway Company, they *proceeded to put the persons who were charged with the management of the affairs of the Missouri Pacific* Railway Company *into the actual control and management of the franchises, property, business and road* of the said St. Louis, Iron Mountain and Southern Railway Company. * * * *

"Your orator avers that since the acquisition of said control, as aforesaid, by said Missouri Pacific Railway Company of all the franchises, property and the business of the said St. Louis, Iron Mountain and Southern Railway Company, the general officers of the said Iron Mountain and Southern have, one after another, retired, and their places have been filled with the same persons who hold and held the corresponding positions in the management of the said Missouri Pacific Railway Company. That * * * *the general offices of the St. Louis, Iron Mountain and Southern Railway Company have been everywhere abandoned and closed, and their business has been transferred to the offices of the said Missouri Pacific Railway Company, and in every respect there has been effected and brought about a complete absorption of the said* St. Louis, Iron Mountain and Southern Railway Company, *and a complete amalgamation of the said two companies, so far as the actual conduct and administration of their business is concerned.* * * * And the said St. Louis, Iron Mountain and Southern Railway Company has, in its franchises, property and business in contemplation of law, and in the intention of the parties and in fact, passed under the control of the said Missouri Pacific Railway Company, within the scope and operation of the language used in the first, seventh and twelfth sections of said contract between your orator and the said Missouri Pacific Railway Company."

The case presented by the bill is different, therefore, from the one in contemplation by the court in the foregoing portion of its opinion; for the circuit judge said that "if the Missouri Pacific *did not see fit to take* "the legal control of the Iron Mountain road the court "could not require it to do so"; but the fact shown by the record is that it *has taken that legal control*, the very administrative control which the circuit judge said was the kind of control meant by the contract. The fundamental fact on which the bill of complaint rests is that the Missouri Pacific has effected a complete absorption of the Iron Mountain; that the offices of the Iron Mountain have all been closed and its offices transferred to the offices and officers of the Missouri Pacific; that the Iron Mountain has been put "under the control "of the Missouri Pacific that they might be operated "together as one institution," and for the purpose of subordinating both roads "*to one and the same* management and control." And for another example, the circuit judge said the stock of the Iron Mountain road might pass into other hands before the decree in this case could be executed. But the bill which presents in its averments the facts of this record shows, as a part of the contract between the Iron Mountain stockholders and directors and the Missouri Pacific, for the transfer of the management of this road, a provision that the stock of the Iron Mountain acquired by the Missouri Pacific "should be RETAINED, *held* AND USED *by* "*it* TO CONTROL *the franchises, property and business* of "the said St. Louis, Iron Mountain and Southern Rail-"way Company *in pursuance and execution of the pur-*"*poses aforesaid*, THROUGH THE AUTHORITY OF THE BOARD *of*

"*directors*" of the Missouri Pacific. The stock, therefore, is held *in trust* for a specific *use*, and the control is as stable as if it were by a lease or consolidation. Either of these might be undone as well.

Without any conflict with the principle which asserts the actual right and the power of directors while in office, it may be true in any given case that the directors, etc., consent and agree to act as mere agents of the party who puts them in, putting their powers under his control. Nominally holding the corporate offices, arrangement and understanding may exist, in pursuance of which they do in fact wield their powers in *an established subordination to the will*, and under the unquestioned control, and *as the mere agents and employes* of the person who controls their holding of their positions; and who, as is agreed and admitted in this case, has put them there for that purpose, and with that understanding. There is nothing abnormal or illigitimate in this. It is the inevitable development of the common law power of the stock, and of the common law power of a majority of the stock to control the corporate action. It is the basis upon which all the railroad "systems" are built up which dominate transportation in this country. Government through directors and executive officers is the *mode* of administration usually contemplated by law. The *authority* which is exercised in this mode is that of the stockholders. This is *equally* contemplated by law. "The stockholders compose *the* "*company;* and the managers or directors and officers "*are their agents*, necessary for the management of the "company, but not essential to its existence as such, and "not forming an integral part." *Rose* v. *Turnpike Co.*,

3 Watts., 46; *Evarts* v. *Manuf. Co.*, 20 Conn., 447. The only lawful *power* administered in any mode, is that of the stockholders. A court of equity ought to deal with the *exercise* of this *power*, whether the usual mode be actually or only *colorably* followed.

That is the precise s*tatus* presented by this bill; and it is the present case, that in this very transaction the ostensible officers of the Iron Mountain are mere agents and employes of the Missouri Pacific. They are, in their nominal offices, executing in this very matter the very agency, in the very subordination, which we assert. That the ostensible independence of the Iron Mountain road is merely colorable; that its nominal administrative officers are really the agents and employés of the Missouri Pacific; that the keeping up of its separate organization and board of directors is a mere disguise; that its apparent autonomy is a fiction; *that all administrative authority is actually exercised by the Missouri Pacific;* these are the practical facts to be dealt with on this record; and they are admitted in the record both by the Missouri Pacific, and by the Iron Mountain corporation also.

The points at which issues have been made in this matter are whether this actual control, since it is *apparently*, as the circuit judge has said, outside the corporate administrative organization, is nevertheless within the intention of the parties to this contract; and, if it is so, then whether such control can be judicially recognized and dealt with. Question has also been made, but not by parties, whether the particular road itself, the St. Louis, Iron Mountain and Southern, is in such relation to the

Missouri Pacific and its system as to be within the intention declared by the contract.

Whether in a particular case the relation establishing such a control exists or not, is a question of fact in that case. It is not a question of law. Such a subordination and subserviency of nominally administrative agents is established, when it exists, *by agreement* and by the understanding of parties. Where such an agreement and arrangement are *averred* as the foundation of a cause they must be *proven* by evidence like any other contract or any other fact. If all the stock of the Iron Mountain road was by agreement between these stockholders and the Missouri Pacific corporation, and with the knowledge and co-operation of the directors of the Iron Mountain, transferred to the Missouri Pacific *for the purpose* of *transferring the ownership and control* of the franchises, property and business of the Iron Mountain to the Missouri Pacific; and for the PURPOSE on *the part of* BOTH *of said* CORPORATIONS of subordinating the *roads of both corporations to one and the same management and control*, viz., that of the Missouri Pacific; and of *running the roads as one line* in the interest of the Missouri Pacific and of the *Iron Mountain as a part thereof;* and with the definite arrangement that the stock *should be retained, held and used by the Missouri Pacific* for the above purpose; and if, therefore, *in execution* of this agreement the Missouri Pacific *assumed the actual control and management* of the Iron Mountain road; and closed all its offices, *and transferred its business to* those of the Missouri Pacific, and has effected a complete absorption of the Iron Mountain as far as the *actual conduct and administration of its business* is concerned, then the *agreement* and the *execu-*

tion of it are facts to be proved; and when proved by evidence the case would be in the same position it is now in, when these facts are alleged in the bill, and are *admitted* both by the Missouri Pacific and the Iron Mountain *corporations* by their separate demurrers. Now when question is made whether this control is within the scope of our contract, almost the only answer is the question: Why is it not? It is the *only effective* control, and the parties must have intended that. It is the only control that can determine whether our cars shall be run or not. It is the only control that can determine whether any sleeping cars shall be run on the Iron Mountain or not, and if any, what cars. Therefore it must be the *identical* control contemplated by the contract. The circuit judge says the control *intended* is "the immediate or executive control "which is exercised by the officers and agents *chosen by* "*and acting under the direction of the board of direct-* "*ors.*" But that depends upon whether or not "*the offi-* "*cers and agents* who exercise the immediate executive "control" in this matter are chosen by and do in fact "act under the direction" of the board of directors of the Iron Mountain road. The whole burden of the bill in this *present* cause is *that they do not* so act. It is of no consequence what has become of the corporate organization of the Iron Mountain company—whether it is kept alive in form and for some purpose or not. There *has taken place*, in effect, a practical merger, as if by consolidation of the Iron Mountain corporation. The Missouri Pacific issued its stock in place of the Iron Mountain stock surrendered to it. That Missouri Pacific stock now represents, *as the bill avers*, "a combined inter- "est in the property of both corporations." It is in effect,

a consolidation of the property. The *property* of the company, that is, the road itself, and the "immediate "executive control" of the business and of the road are transferred to the Missouri Pacific board of directors. The Iron Mountain board is divested of the administrative and executive control of all this. It is transferred by a contract arrangement just as permanent and substantial as a lease. The Iron Mountain stock, pooled in the hands of the Missouri Pacific under a trust created by contract for the special purpose, is no more liable to be dispersed in breach of the contract purpose, than a lease would be to be abrogated. It is the Missouri Pacific which has the immediate executive control of the property, franchises and business and of the road of the Iron Mountain company, in order that the *Missouri Pacific* may operate "*both roads together as one line.*"

The stock was pooled for a special *purpose*—to make of these two roads *one line* under the *same* management. This is *impossible* without the *control* called for by this contract. If the Missouri Pacific had merged the other by consolidation with itself, no one would dispute that it was brought within this contract. If it had caused a deed to be made to itself, or a lease, there would be no dispute. By the exercise of its own power it has chosen a method which equally accomplished the special purpose, and has made of the two roads *one line* under one and the same management. This management involves and requires *control*, if not by ownership or lease, then "*otherwise.*" The result is accomplished. The control described in the contract exists and is exercised. Why is not the contract in force then?

Therefore, we submit that the circuit judge is dealing with a case different from the one primarily stated in the bill of complaint, in the language of his opinion which is quoted on foregoing pages.

The case primarily presented by the record does not rest on an "ultimate *power* of control" in the Missouri Pacific; but upon an immediate, executive, practical control touching the property and business, and the road itself, of the Iron Mountain. This extends to the "actual "conduct and administration of business," and to the operation and management of the road, as a part of the Missouri Pacific, and as making "one line with it." The Iron Mountain line is made one line with the Missouri Pacific. The control of the Missouri Pacific is just *as immediate and executive over any one part of this entire line as over any other.*

There is more in this state of things than an *ultimate power* of control, and we believe a much less direct and executive control than is presented by the bill would be within the fair obligation of this contract. The provisions of the Missouri Pacific contract extended "over all lines of "railway which it then controlled, or *might thereafter* "control, by ownership, lease or otherwise." If this company acquired or built a direct or lateral extension of its line, and indirectly controlled it, though owning it, under the form of another organization, and by this "ultimate power of control" brought it into direct, practical working as a part of its line, so that the will of its board of directors practically dominated in its management, there can be no doubt that the *moral* obligations of this contract would include the new extension.

If the Missouri Pacific should call upon the Pullman company to run its cars over it, the obligations of the Pullman company and of the railway company being expressed in exactly the same terms, it would seem an offense against sincerity and good faith for it to meet refusal on the ground that it did not *control* the new line "by ownership, lease or *otherwise*." If to the statement: "Why we own the whole thing out and out; it is "ours, for we built it; these directors and officers are "of our appointment; they manage the property as our "agents to carry out our orders and perform our obliga-"tions; and when they do not we will remove them," the Pullman company should reply: "That is not a control of "which either our contract or the law can take cognizance; "by conclusive presumption of law you are identical with "the mere voting constituency of a political town or county; "the veil of this separate organization cannot be penetrated, "either by us or by a court of equity so as to see any "contract of yours behind it, whatever your practical re-"lations may be," we submit that there is not a man in the world to whom this would not seem a manifest evasion, having all the color of duplicity and *mala fides*. Still more unjustifiable would such evasion appear in light of the admission of the subordinated corporation that this statement of the ownership and control of the proprietary corporation was true. Such admission exists in the case at bar.

But we are not disposed to accept so narrow a construction of the moral and legal obligation created by the relation between these roads shown by the bill, and

by the contract, as is outlined in the following quotation from the opinion of the circuit judge:

"The language does not refer to the *ultimate power* of control which always lies in the stockholders, and which may be indirectly exercised by them at stated periods by the election of directors. It means the immediate or executive control which is exercised by the officers and agents chosen by and acting under the direction of the board of directors. Every corporation, whether private, public, or *quasi* public, has a constituency behind it to which it is responsible, and by which it may in the end be controlled."

Having in mind for the present only this same ultimate control, or "ultimate *power* of control," by which an owner of all the stock of a corporation, (as the Missouri Pacific is of all the stock of the Iron Mountain), must at established periods determine and constitute the whole administrative force of the corporate organization, and can thus control the administration and compel the carrying into effect his own policy, contracts and obligations, and from time to time supersede and displace any individual opposing his will in any respect,—speaking only of this control, we insist that it is a control *expressly* within the terms and clearly within the intention of this contract. This *is* a *control*, and one that cannot be resisted in its lawful exercise; and it is a control by *ownership*, as we think, but if not, it is a control "*otherwise*." The briefest analysis of the contract proves this. By the contract the railway company agrees to carry the Pullman cars "on *its own* line of road AND on all roads which "it now controls, or may hereafter control by *ownership*, "lease or *otherwise*."

The first effect of this contract is to clasify the Missouri Pacific roads in *two* classes. The *first* class com-

prises "*its own* line of road." The *second* class comprises all roads which it does or may hereafter "*control*." This *second* class, being the *controlled* roads, includes:

1. Those controlled by "*ownership*."
2. Those controlled by "*lease*."
3. Those controlled "*otherwise*."

Now it controls "*its own* line" by ownership, and, within the definition laid down by the circuit judge, its board of directors does directly choose the officers and agents that carry out there its "immediate or executive "control." If it should buy another road out and out and become its absolute owner by deed of conveyance, it would necessarily control it in the same way, for it would be "*its own*." It would fall in the first class created by this contract. But in the second class under this contract the phrase "control by ownership," relates to roads *not its own*. There are the *controlled* roads, and the roads that are its own. It is with *careful precision* that to roads in the second class the words "con- "trol by ownership" are applied; to the roads over which it exercises a control by ownership, but which are neither *its own*, in the same sense as is its own line, *nor controlled by it in the same way*. Some entirely different *method* is in the phrase "*control by ownership*," set over in direct opposition to the method involved in the phrase "*its own* "*line*," when speaking of the property which it owns absolutely and *governs directly*. It is an idea of control by ownership which is certainly *not* that defined by the circuit judge, and not that involved in the government of *its own* road. It is certainly a control by ownership, but by a *different mode*. The idea of *such* control by owner-

ship as it exercises over its own original line is expressly excluded. So the direct control exercised over a leased road is equally distinguished. And all modes of control not founded on ownership are equally distinguished by the enumeration of roads "controlled *otherwise*." Now, in the face of this careful distinction, where does the court find authority to say, nevertheless, that by this peculiar phrase only the *same* sort and manner of control is meant as that which the company exercises over property absolutely its own? Whatever the phrase may mean, this one thing seems certain, that it is some *different* thing from that. What other control by ownership over property not "its own," as its own line is, can possibly be intended *than this upon which we are insisting?* It comes exactly within the express terms of the contract, and what other "control by ownership" can the phrase be held to intend?

It is a control that enables the Missouri Pacific to do all that this contract calls for. We are not asking to put it in the position of one who has contracted to do what he cannot perform. Unresistible control, adequate to the full purpose of the contract exists, if the obligation of the contract is allowed. Whether a court of chancery will enforce by its agency the exercise of this particular form of control, if none more direct exists, or will leave us to an action at law for a broken contract, has nothing to do with the *construction* of the contract and the *question of its obligation.*

There is reason and authority for the proposition that the known wishes and views of corporate policy of the great majority of stockholders, the obligations as

to the corporate management which they have undertaken and assumed with others, *create a duty* upon directors who are elected with the understanding that they will carry them into effect and for that purpose; that within certain limits, the intentions, policy and contract obligations undertaken by the representative of all the stock impose obligations upon directors who are elected with the understanding that they will carry them out; and that this is an obligation of which a court of equity will take notice, notwithstanding technical distinctions between the shareholders and the directory, as having the management of the corporation. There is reason and authority to say that directors will not be permitted to fly in the face of the known views of policy, and known wishes, intentions and obligations of the stockholders who elected them. In the *Mahoney Mining Co.* v. *Bennett*, 5 Sawyer, 141, the directors elected by stockholders who had come to be in a minority made a lease of the corporate property, which the court held improperly made and set aside for the following reason: It had come about that a majority of the stockholders were opposed to the policy of the minority; and the existing board of directors, colluding with the minority of the stockholders, in order to forestall the action of the majority when it should come into power by the election of a new board, made the lease in question. The court held the known views of the policy of the majority obligatory on that board of directors, and that the attempt of that board, in combination with the minority, to thwart the views and policy of the actual majority was improper; and that the present directors had no right to enforce their own views by anticipation, and to forestall the

known wishes and policy of the persons who held the majority of the stock. By parity of reasoning, if this contract is obligatory upon *the Missouri Pacific* it represents a policy and an obligation of good faith which is *binding upon the Iron Mountain directors;* and they would have no right by collusion, or by subserviency in using their position to *aid the Missouri Pacific* in the violation or evasion of its contract.

This Iron Mountain board was elected to carry into effect the policy, purposes and *obligations* of the Missouri Pacific. It was elected with the understanding that it would do so. If this contract bound the Missouri Pacific, it bound also that other shadow of an independent corporation. It must be presumed that it was so elected. It fastened upon that vicarious board an obligation which cannot be violated and thrown off without bad faith and fraud upon the persons who, standing by contract in the place of the stockholder company, are entitled to have the obligation performed. Such is the principle involved in *Mining Company* v. *Bennett, supra.*

In *Fauldes* v. *Yates*, 57 Ill., 416, two or three stockholders bound their stock by contract for the purpose of thereby getting and exercising control of the management of a corporation in which they were interested. It was claimed that such contract was opposed to public policy and was therefore invalid. But the supreme court held that a contract made between stockholders to bind the use of their stock to secure the absolute control of the corporate business was a lawful and valid contract. In *Havemeyer* v. *Havemeyer*, 43 N. Y. (Sup. Ct.), a number of stockholders contracted to combine their stock, amount-

ing to a majority, for the purpose of controlling the affairs of the corporation, and agreed that no one should sell unless in connection with the others, so that all should get the common benefit of the use to be made of this majority of the stock in the control of the corporation. One of them privately sold his stock, and in an action for damages the contract was held valid and he liable in damage to the others for the difference between what the others could get for their stock after he broke his agreement and what he sold his for while it was pending.

A *control* by holders of a mere majority of stock over the *corporate action* is, therefore, *a recognized factor by the law.* It is a *valuable* and a *lawful subject-matter of contract.* Now, if stockholders have such a right recognizable and enforceable by courts to bind their stock by contract *in order to create* in their hands a *control* of the business management and affairs by the use of it in electing directors, then *it must follow* that having created such control they have authority to contract with third persons as to what they will do or cause to be done by the board of directors *created by them and chosen for the purpose of carrying out their obligation.* Such obligation will repose as an obligation upon that board, and all persons having in good faith contracted thus with the dominant stockholders should have rights entitled to legal protection against the action of that board, colluding actually or constructively with third persons and the contracting stockholders, to evade and defeat a portion of the contract.

Turning again to the terms of this contract, it includes *control* by ownership, lease or "*otherwise.*" It is not easy

to image anything more comprehensive of *all kinds* and *modes* of control. This holding of all the stock is certainly a *control*. The capacity of recalcitrant or fraudulent directors to thwart for a time the power of the stockholders is not very permanent, nor is the protection of its exercise very exigent or meritorious in the eyes of equity. But this is all that in the contemplation of law *exists*, to distinguish the "control" defined by the circuit judge from the control usually exerted by the stockholders. This is the only difference by which the evasion of this contract can be sustained. If not quite so immediate at all times, and so direct over the executive agents and officers as that of the board of directors, and if sometimes exposed in legal theory to some delay, it is far more absolute, permanent and effective than that of the directors. It can at regular and established periods at least, suppress the opposition of directors as easily as they can that of subordinate agents, and can supersede and displace all directors and agents alike. *It is a control entirely adequate to effect the purpose in view of which the parties were contracting.* If not technically and specifically a control by ownership, it *is* a control "*otherwise.*" *It is enough for the requirements of this case that it is a control at all.* By what authority is this practical and efficient control to be excluded from the all-embracing amplitude of this language? By what authority can it be said the parties were not striving to include *every form* of control by which the Missouri Pacific could make its will dominant over the subject matter of the contract? It is conspicuous on the face of the contract that they did so intend; and the language fully expresses such

intention. To exclude this effective control is not to construe, but to make a contract for the parties.

In *Tasker* v. *Small*, 6 Sim., 625, there was authority to raise £15,000, "by mortgage, annuity or otherwise," and these words, "or otherwise," were held "sufficiently ample" to include a power to sell the estate for the purpose. In the present case they must be "sufficiently ample" to include *any* control *adequate to effectually carry out a disposition to perform* the contract. Here is a control that *enables the Missouri Pacific to perform* this contract on the Iron Mountain *if it chooses to do so.* Therefore, it must be included, and the obligation of the contract ought not to be evaded.

As already said, it is enough for the requirements of this case, that the bill shows a *control* that enables the Missouri Pacific to do on the Iron Mountain road what this contract calls for. I think it altogether unimportant by what mode, instrument, or intermediaries this control is exercised. The *purpose* to clothe the Missouri Pacific with such control that *it may manage* the Iron Mountain road as *one line with* the Missouri Pacific; the permanent deposit, by exchange, of all the stock *for that purpose;* and the *actual assumption of that management* by the Missouri Pacific, make up the case that is presented by the bill. Whether the Missouri Pacific disbands the Iron Mountain organization altogether, and appropriates its property as part of "its own line," or appropriates the single and direct control of the road, and leaves the corporate body to live on by itself; or uses that corporate machinery to effect that "control by ownership," which is mentioned in the contract as differing from the

control over "its *own* line"; or takes to itself a lease of the property; or "otherwise" assumes and exercises the *power to perform* the contract is immaterial. The averment of the bill is, that the Iron Mountain road is put into the control of the Missouri Pacific to be managed, and that it is managed, as a part of one line with its own line.

If the Missouri Pacific, with its power over the situation, saw fit to conduct this management and exercise its dominant will over the Iron Mountain through the established subordination of the simulated separate organization, it seems impossible that it can have been seriously considered that so transparent a disguise effectually hides the real power from the court of chancery. Where the fact is proved or admitted in the record that the separate organization, which, for any reason, has been seemingly interposed, is merely colorable; that its seeming power over executive agents is not real; that its apparent authority is not practical at all; that it is an instrument merely, not an actor; that the original authority in administration—the actual power and its practical exercise—is that of the Missouri Pacific only, it is in such case incredible that the court cannot practically recognize this *alter* organization for what it is—a fictitious thing and a nullity. Is it possible that so practical a relation as this cannot be dealt with by a court of chancery? Is it possible that so long as this empty, separate organization is upheld, the court *must conclusively presume* that the real corporate power lies in it, and that too in the very teeth of the actual fact proven

or admitted in the record? If that is the purport of the language of the circuit judge, then that language seems to be a formulated declaration of the incapacity of the court of chancery to deal with one of the most important and practical business facts of the time. It is a declaration that courts must be judicially blind to what is the most conspicuous fact of the day to every common citizen,—the fact that along all the important lines of transportation the individual roads are usually worked up into "systems"; that the boards of directors, presidents, etc., do not always or even usually control administration in such a matter as that in question here; that they are the mere employes and agents of him or them holding a bare majority of the stock, or possibly even less; that by acquisition of this "control"—which has become a common phrase in public speech to designate a known commodity in the public market—an individual, holding, perhaps, no corporate office at all, may come to wield an absolute dominion over a combination of railroad organizations, and a concentration of railroad property and of railroad power, that, reaching to the smallest details of management puts him on a throne of social power, that is greater among sixty millions of people than that of all the departments of government combined.

Now, I do not ask the court to assume that in all cases the administrative affairs of roads are subordinated to such a control. But I ask it to recognize the notorious fact that it is often so; that this "control" lying quite outside the corporate officers, and which subordinates them to a mere agency, is actual and active, and a practical fact in daily affairs; and when it is averred as

a fact, and proven or admitted in a particular case, to recognize it like any other practical fact and to deal with it accordingly.

Will any one deny that such a "control" as this is a practical fact in the railroad administration of the country? Will any one deny that this subordination of the corporate officers to a simple agency for one holding, it may be, no corporate office at all, but the maker and unmaker of all corporate officers, appointing and removing them like clerks, is a common fact in railroad experience? The instances and illustrations are not far to seek. Will any one deny that this form of *control* is a practical control that dominates throughout the great groups of corporations that make up the railway systems of the country? By such control every purpose of dominion equivalent to absolute proprietorship is accomplished. It is a power that can disturb capriciously the proportion of every man's resources to the cost of his subsistence, and must courts alone be blind to a fact so certain, so common, so notorious? Is it possible that the court cannot grapple a fact so related to public security, and that by the flimsy veil of a separate corporate appearance the vaunted penetration of the court of chancery is baffled? Can the court by so thin an imposture be made helpless while contracts are broken, and the just performance of obligations is eluded?

This contract includes the operation of these Pullman cars over the Iron Mountain road if the Missouri Pacific "controls" that road "by ownership, lease *or otherwise*." There is disclosed here the control that must determine whether these cars or whether any sleeping cars shall be operated over that part of its line or not. If the

Missouri Pacific has this control over that part of its line it is bound there to perform this contract. Its interposition of a mere semblance of management through a separate organization, its raising of a mere fiction of legal imagination, without any practical power at all, gives a shelter for evasion and bad faith. It rests only with itself whether it will assume a relation of absolutely direct and immediate control or some other. It rests with itself how far, under the present relation, its control shall be direct and immediate. It is the actual fact that under the present relation the control over the whole line is the same; and that it is as direct over the Iron Mountain part of it as it is over the Missouri Pacific part of it. That is the practical fact for the court to deal with. The Missouri Pacific sets up this fictitious appearance as a disguise to cover its own actual exercise of power; *and it can make it vanish, too.* Meanwhile behind it good faith may be abandoned, a fair contract broken and legal and moral obligations despised. Is the court conclusively baffled by this disguise, so that there is neither relief nor redress? That is the question in this case.

The struggle to bind Proteus has always seemed to typify the grappling of equity jurisprudence with all the metamorphoses of deception; and everywhere the court of equity has asserted its power to penetrate every form of disguise, and defeat every evasion of legal obligation. But if here is a control which can carry this provision of this Missouri Pacific contract into effect on the Iron Mountain part of the line, then it is a control which brings that part of the line within the terms and obligation of that contract. If it is a control which can determine whether the terms of that contract shall be in

good faith observed on that part of the line, or shall be evasively and covertly violated, then it is the practical control which the court of equity should grapple in its practical action, lest the lofty language in which the penetration of disguises, and the unmasking of deception is vaunted, might seem vain-glorious to incredulous ears, and to announce only a *power* of capricious and uncertain exercise; for it is thwarted here by the most diaphanous film of legal fiction.

It *is* the law that the administration of a railroad in its normal condition belongs with its board of directors and the executive officers and agents whom the board appoints. It *is* true that the law does not contemplate that stockholders will ordinarily exercise this executive control. On the other hand, it is notorious in practical affairs, that directors and officers are often the mere instruments and agents of the stockholder who can create and displace them; and exercising no original will of their own, are by arrangement and a relation perfectly established and understood, as completely the instruments of his will, and as completely subordinate to him as any executive agent, a superintendent or a conductor, ever is to his superior. This is the practical business fact, whatever the legal theory may be. One can easily instance an aggregate of over 6,000 miles of railway, and several boards of directors and attendant officers, and another aggregate of over 10,000 miles of railway, and many boards of directors, etc., as to each of which the world would laugh at the suggestion of opposition by any director or board or officer to the will of one man on the question as to what sleeping cars should be operated over the entire mileage. An absolute, personal

and direct control will govern there on that or any similar question, to which presidents and directors hold themselves as subordinate as a conductor does to a president. Cannot this practical fact of the business world be made practical in a court of equity also by proof or admission? If not, it requires but a feeble exercise of imagination to see some sinister-eyed Mephistopheles of railroad combination pass nimbly into the subordinate legal fora of the country, and benumb all their powers to vindicate good faith or defeat the evasion of any obligation. He might say, in an infinite variety of cases: "I made this contract; I control this road by absolute dominion; these apparent officers are by an established relation my agents; this contract will be observed or not, as I direct; no opposition to me upon this subject is possible in the situation; all this I admit, but sitting in your judicial seats you cannot take cognizance of this." Pointing those courts to the words of cases, in the books but not founded as this is, and to the formal statement that the "control" of a railroad means in a contract *never any but* "the immediate or executive "control which is exercised by the officers and agents "chosen by and acting under the direction of the board "of directors," he may say: "This is the limit of your judicial vision. No stockholder can be held to control a road if he chooses to interpose the semblance of a board of directors; and while you sit here to pick this feather in this tar, I will go on my way to break contracts, to destroy the value of investments, to ignore all the obligations of good faith and of law before the open eyes of all mankind, but just beyond the limits of your remedial jurisdiction."

Of the Remedy by Injunction.

The special and peculiar character of the business conducted by the complainant, under its charter, makes all remedies inadequate except those of the court of chancery. By its very nature it appeals with unusual force to their protection; for it is a business dependent upon such contracts as this with railway companies transporting passengers. Its property lies largely in these contracts, and its value lies in the *uninterrupted operation of the course of business* provided for by them. A telegraph company can operate its business independently of a railway, or of contracts with railways. It may do it more conveniently in connection and in contract relation with a railway, but it can operate independently. A telepraph company can go outside the right-of-way of a railway anywhere and does not need a contract to do its business; but our business is one by terms of our charter which cannot be operated except through the medium of such contracts as these we make; and our *franchise* is worthless, the whole thing is unavailing unless these contracts can be protected in this way. No such form of property is known to the common law. No common law remedies are adequate to deal with it.

But the private right of the appellant is not all that appeals to and has need of the protection of equitable remedies. Courts have frequently declared that the public convenience met by the peculiar service rendered by cars of this character has now grown into a public necessity. Like every new facility for intercommunication,

it has become a part of the foundation, assumed to be secure, of the social and business habits of millions of people. The journey of ordinary cars is usually limited by the length of the roads on which they run. Their passengers now, as years ago, change by day or by night, at the ends of short routes. It was the first office of the cars of this appellant to bridge over these changing points and give through and uninterrupted journeys over the combined length of successive roads. A few illustrations will be significant. A car running from New York to Jacksonville must pass over the lines of thirteen different railroad companies. A car going from Washington to New Orleans passes over eight. Over every one of these it passes by virtue of a contract such as is here shown. If any one road in a long through line, established by a series of these contracts, may violate it through caprice or for coercion, or for every disputable matter may side-track the cars and suspend the operation of the contract, the service along the whole line will be thrown into confusion, contracts with other and different roads will be rendered inoperative and useless and the necessities of the public defeated. No action at law for damages to the appellant merely is adequate remedy or any relief for such a case. The courts of equity and those only, are able to deal with such a subject matter, and their remedies only are adequate to provide for such a situation, while disputed rights are adjudicated or adjusted.

We bring here a corporate franchise that can be exercised at all only through the medium of contracts with a railway company for its exercise. In the exercise of that franchise, through such contracts, this corporation

has come to be one whose property is of immense value. It is entitled to the full meaning of all the observations of Justice Miller, in 1 McCrary, 596, concerning the consequences of a failure to protect this sort of property in its relations to its stockholders and to the public interest. What he says of telegraph business and property is more urgently true of this corporation and its business. He says that they, "like the good will of a newspaper and "hotel, *have a character so different from ordinary personal* "*property*, or ordinary real estate, that *when we come to* "*deal with injuries to it we must look at in a different light* "*from what we do the injuries to those classes of prop-* "*erty.*" We come within the incontestable principle asserted by Justice Miller, and we illustrate with peculiar significance its accuracy and justice.

The *immediate* authority upon which the bill in this case was framed, was the case of *The Western Union Tel. Co.* v. *The Union Pacific Ry. Co.*, which being reported at different stages, appears reported three different times in 1 McCrary's Rep., at pages 418, 558 and 581. The case as first reported sets forth the contract between the telegraph company and the railway company, for constructing and operating a line of telegraph upon the right of way of the railway company; that the railway company were refusing the telegraph company the exercise of the contract rights which it claimed, and were threatening to cut its wires. The prayer of the bill was, that the court would enjoin the defendants *from interfering with the plaintiff's conduct of its business.* This *prayer for injunction was the only prayer of the bill*, except the general prayer. A demurrer to this bill was sustained, on the ground of the obnoxious character of

a certain provision of the contract, but the complainant was given leave to amend, and the injunction allowed to stand until the amended bill should be before the court.

The case reported at page 558, was heard upon the amended bill, it having been agreed by counsel that the motion to dissolve the injunction should be regarded as a general demurrer to the amended bill. The bill did not pray for specific performance, nor, except, by the general prayer, *for any relief save by injunction against the violation of contract* by the railway company; and to the objection made upon that ground, his honor Judge McCrary said:

"It is insisted by counsel for defendants that the contract set out in the bill (assuming its validity), is one which requires the performance of continuous duties, involving the exercise of skill, personal labor and cultivated judgment: and that, therefore, a court of equity will neither decree its specific performance, nor enjoin its violation. That the contract is in its nature incapable of being enforced by a decree for specific performance, is very clear. (*Marble Co.* v. *Ripley*, 10 Wall., 339.) *But it does not follow that a party to such a contract can have no injunction to restrain its breach.* It is now settled, I think, by the decided weight of authority that in such cases, although the affirmative, specific performance of the contract is beyond the power of the court, *its performance will be negatively enforced by enjoining its breach.* (Pomeroy on Specific Performance, §§ 24, 25, 310, 311 and 312, and cases cited.) If, therefore, the contract shall be finally held valid by reason of the elimination of the vicious clause, or on any other ground, it will follow that the injunction was properly granted."

In the next reported stage the case came before Mr. Justice Miller and Judge McCrary on a further motion to dissolve this injunction.

There were other questions in the case—questions relating to the fact and to the validity of the contract for

which protection was asked; to the corporate powers of the complainant; to the effect upon the contract at large of a certain vicious clause contained in it; but whatever other questions may or may not have been in the case, this question was directly raised in it, viz: the office of equity to *uphold* a contract; *to enforce it negatively by injunction against its violation, upon a bill praying for no other form of relief whatever.* The opinion of the court is given by Mr. Justice Miller. He calls attention to the *prayer* of the bill; to the fact that four or five motions to dissolve this injunction have been made and overruled as many times by as many as three or four different and very competent judges; and he says: "After a week of argu-"ment and a very careful consideration of the case, I "propose to give the result of that consideration in the "present opinion." And he *refused to dissolve* the injunction.

Upon these cases and these rulings *our bill was framed.*

The court will observe that this contract contains both affirmative and negative covenants, namely among others, that the railway will operate our cars for the contract period upon the terms specified, and will haul them on all its trains, and also that it will not during that period make a similar contract with or permit that business to be done by other persons. Where such negative as well as affirmative covenants exist, no rule can be better settled by the weight of authority than the one we now urge before this court.

In Leading Cases in Equity, Vol. 1, pt. II., p. *815, notes to *Cuddee* v. *Rutter*, it is said:

"Where a person has entered into a contract *not to do a thing,*

specific performance of such negative contract will be enforced by an injunction restraining him from doing anything in contravention of it."

Pomeroy on Spec. Perform., §§ 24, 25, 310, 311 and 312.

In section 310, it is said:

"Such contracts may, however, according to the doctrine now universally established in the English equity courts, be negatively enforced by injunction, whether they contain express negative stipulations or not; that is, whether the defendant specially agrees not to do certain acts, or only affirmatively undertakes to do certain other acts."

In *Singer Co.* v. *Union Co.*, 1 Holmes R., 256, Judge Lowell, reviewing all the cases by which the rule we assert is fully established in England, says:

"I think the fair result of the later cases may be thus expressed: If the case is one in which the negative remedy of injunction will do substantial justice between the parties, by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, THE COURT WILL INTERFERE TO RESTRAIN CONDUCT WHICH IS CONTRARY TO THE CONTRACT, ALTHOUGH IT MAY BE UNABLE TO ENFORCE A SPECIFIC PERFORMANCE OF IT."

Jones v. *North*, L. R. 19, Eq. 426.
DeMattos v. *Gibson*, 4 DeG. and J., 276., 299.
Vincent v. *C. & A. R. R.*, 49 Ill., 33.
Frank et al. v. *Brunnemann*, 8 W. Va., 462.
Rankin v. *Huskison*, 4 Sim., 13.
Mining Co. v. *Water Co.*, 1 Sawyer, 470.
Same v. *Same, ib.*, 685.

In the latter case Mr. Justice Field said:

"The injunction, *although preventive in form*, is undoubtedly mandatory in fact.

"*It was intended to be so by the circuit judge who granted it*, and the objection which is now urged for its dissolution was presented to him, and was fully considered. I could not with propriety reconsider his decision, even if I differed from him in opinion.

"But were I not restrained by this consideration from interfering with the order of the circuit judge, I should hesitate before dissolving the injunction upon the ground stated. *The benefit of the preventive remedy afforded by courts of equity in the process of injunction would often be defeated, if the remedy only extended to cases where obedience would not require any affirmative acts on the part of the party enjoined.*"

We respectfully insist that we are entitled as of course to the injunction in support of the negative covenants in our contract; but we also insist that we are entitled to the protection of the same remedy in support of the affirmative covenants also; and that the defendant should be restrained from putting away our cars from off the line, and from discontinuing their use upon passenger trains under the contract under which they have been furnished.

If the obligation of the Missouri Pacific contract exists between these parties, we seem to be in the exact position in the matter of remedy by injunction of the express companies, as in, for example, the case of *Memphis & Little Rock* v. *Southern Express Co.*, 8 Fed. Rep., 799. The right of the express company against the railway company for the performance of certain services, is founded upon certain *common law obligations* of the railway company as carrier. The Pullman Company founds its claim against the railway for the performance of services *identical in character*, upon the *contract* obligations of the railway company. There is nothing *in the nature of the*

service sought to be enforced that can distinguish one of these cases from the other.

The right of the parties to the services in question being assumed, the *remedy* in either case *ought to be by the same modes of judicial intervention.* In the express company cases the court said:

"*Fifth.*—I am of the opinion that it *is the duty* of every railroad company to provide such conveyance *by special cars, or otherwise,* attached to their freight or passenger trains, as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually and usually engaged in the express business."

"*Seventh.*—I am of the opinion that a court of equity, in a case properly made out, has the authority *to compel the railroad companies to carry* this express matter, *and to perform the duties in that respect which I have already indicated,* and to make such orders and decrees and to enforce them by the ordinary methods in use necessary to that end."

"*Eighth.*—While I doubt the right of the court to fix in advance the precise rates which the express companies shall pay and the railroad companies shall accept, I have no doubt of its right to *compel the performance of the service* by the railroad company, and after it is rendered to ascertain the reasonable compensation and compel its payment."

In *Memphis & Little Rock R. R. Co.* v. *Southern Express Co., supra,* the court goes far beyond anything required in this situation. It first by its decree *finds what had been the course of business,* and what the services and facilities furnished by the railroad company to the express company, and *then* proceeds to enjoin the railroad company *from interfering with or disturbing* the *enjoyment of these facilities.* See the printed record of that case in this court, page 38.

Of course we have nothing to do with so much of these cases as investigates the legal obligation of the railroad companies, but only with the methods held to be available in equity for *enforcing* them.

In *Railroad Companies* v. *Express Companies*, 10 Fed. Rep., 210 and 869, the court *declares the duty* of the railroad company to provide the express company with suitable conveyances by *special cars* or otherwise *attached to their trains*, and declares that there is no doubt of the right of the court to *compel the performance* of this service by the railroad companies. There is no difference in the services required in those cases and in this one.

If the providing of conveyance, by special cars or otherwise attached to their freight or passenger trains, such as may be required for the safe and proper transportation of express matter on the railroads, is a duty of the railway companies, the performance of which may be compelled affirmatively or negatively by injunction, then beyond all question *the performance of similar duties* in discharge of their contract obligations to the Pullman company *may be by like methods compelled.*

If the performance of these duties, notwithstanding the character of the *services they involve*, may be compelled by a court of equity by affirmative decrees for specific performance, then the *same remedy* may and ought to be correspondingly extended to the Pullman company. See *Tayloe* v. *The Mercantile Fire Insurance Co.*, 9 How., 390.

In 13 Federal Rep., 3, *McCoy* v. *Railroad Co.*, it was held by Judge Baxter that, because railroads are *quasi* public corporations, courts of equity may affirmatively

compel the performance of all duties of a public character irrespective of remedies at law. And in *Wolverhampton, &c., R. R.* v. *London & N. W. R. R.*, 16 Eq. Cas. (L. R.), 434, the same is held where the duty is not public but arises under a private contract.

All decisions establish that the mere fact that the injunction is to operate *affirmatively, i. e.*, to compel the affirmative performance of such a duty as to furnish and haul cars, and to continue without interruption an established course of business, is not an obstacle in a court of equity, if the court is satisfied that justice can best be subserved in that way. The court *can* do all this consistently with its precedents and settled principles if it *will.*

And now we ask what reason is there why this relief should not be readily accorded? It is founded on well recognized principles of law. The contract we present was made between perfectly competent parties; the particular in which we ask it to be enforced was within the actual intent and purpose of the parties when it was made, and no issue whatever has ever been made on that subject, or a doubt suggested, by the parties; the contract is open to no objection, and none was ever suggested based on morality, public policy or law. Why then is it not *entitled to the favor* of the court? And when we come to remedies, what reason is there why equitable remedies should not be applied with the utmost readiness, when a field for their operation is afforded by the relations of parties? There is no rule at this day that they are to be availed of only as a last resort. Cedric, the Saxon, had no need of equitable remedies to protect his swine, but the artificial character of modern so-

ciety and property calls for a more highly developed system of law than such as was adequate to protect the simple rights of the Saxon. With great respect we insist that equitable remedies are to be applied freely,—not reluctantly, but freely whenever in the situation of parties they are more salutary. Lord Eldon said, 9 Ves., 608, and the remark is constantly quoted, that in a proper case specific performance is as much of course in a court of equity as damages are at law. That is only a recognition that in our time all equitable remedies are of course where equity can take jurisdiction; and it will always take jurisdiction when its remedies are more adequate and complete. Compared with them what can be said in a case like this of actions for damages? The injury to or *interruption of a franchise* is a well recognized ground of equity intervention, because the injury is *insusceptible of being measured by damages.* There is no other remedy. Consider the hopeless and interminable process of working out a remedy by actions for damages, under such a contract running for several years to come! How many of these actions must there be? The fares are little things, varying from fifty cents upwards; they never reach five dollars, except over long journeys of a thousand miles or more. Every car drawn would be a violation of the negative covenant; every fare collected on the train, or ticket sold at the company's office, would be a violation of the affirmative covenants of the railway. Where, too, is the remedy or redress for the cost and burden of all these suits, for which law gives no damages? And to what degree must this multiplicity of suits be amplified before, upon this ground alone, a court of equity must

take jurisdiction under its plainest rules, and stop this foolishness of pursuing a remedy at common law? We believe our contract is as well entitled to the aid of a court of equity as any that ever challenged it. Equity can give a remedy adequate and complete. To withhold it is to subject the contract to outlawry, and to refuse us any remedy at all. Certainly, to speak of sending us to a court of law with our franchise, useless unless equity will uphold it; with our contract, void of any obligation worth speaking of unless equity will protect it; with our multitude of actions, each too small to be fit for a court of record, and against which the doors of the courts of the United States are barred; with the unredressed burden and cost of all these prosecutions, is to withdraw the protection of law altogether from a system of contracts and a lawful business of the greatest magnitude, which have, to an extent nowhere surpassed, promoted the development of commerce and facility of *inter-communication*, the comfort and convenience of travel and the amenities of civilized life.

EDWARD S. ISHAM,

Counsel for Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1885.

PULLMAN PALACE CAR COMPANY,
Appellant,

AGAINST

THE MISSOURI PACIFIC RAILWAY COMPANY and THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF OF APPELLEES.

BY JOHN F. DILLON AND A. T. BRITTON.

Statement.

THE CASE was determined in the Court below on a demurrer to a bill for an injunction.

The demurrer was sustained, the injunction refused and the bill dismissed. The complainant electing to stand upon its bill, has brought the case here upon appeal.

THE FACTS alleged in the bill are, in substance:

I.

That at date of filing the bill, December 12, 1881, the St. Louis, Iron Mountain and Southern Railway Company "*is now* and has been for many years past "engaged in the use of your orator's cars, such as "aforesaid, upon its passenger trains, using and "employing the same under the terms and provisions "of the contract made between your orator and the "St. Louis, Iron Mountain Railway Company, bearing "date the 20th day of November, A. D. 1871, and "which said contract provided that it should continue "in force for ten years, and until to include the 20th "day of November, 1881" (Record, p. 2).

II.

"That said St. Louis, Iron Mountain and Southern "Railway Company has continued to operate its cars "under said contract, but that said contract would by "its term have expired on the 20th day of November, "A. D. 1881, * * * and the said Railroad Company "has given notice to your orator that it would cease "to operate its railroad with the cars of your orator "after the 20th day of November, A. D. 1881" (Record, p. 11).

III.

"That by agreement, dated November 10th, 1881, "the provisions of the aforesaid contract were ex-"tended to December 15th, 1881, without prejudice "to the rights of either party, but leaving same to "remain as at date of the first supplemented con-"tract" (Record, pp. 11 and 19).

IV.

That on the 8th of May, 1877, a contract was entered into between the appellant and the *Missouri Pacific Railway Company*, under the first clause whereof the Pullman Palace Car Company agreed to

" furnish drawing-room cars and sleeping cars to
" be used by the Railway Company for the transporta-
" tion of passengers, sufficient to meet the require-
" ments of travel on and over its line of railway, and
" on and over all lines of railway *which it now controls*
" *or may hereafter control by ownership, lease or other-*
" *wise*" * * * (Record, p. 15).

Under the seventh clause thereof, the Missouri Pacific Railway Company agreed to haul the aforesaid drawing-room and sleeping cars

" on its own line of road and on all roads which it
" now controls, or may hereafter control by ownership,
" lease or otherwise" * * * (Record, p. 16).

Under the twelfth clause thereof, the Missouri Pacific Railway Company further agreed, that

" the Pullman Company shall have the exclusive
" right for a term of fifteen years from the date hereof,
" to furnish, for the use of the Railway Company,
" drawing-room or parlor and sleeping cars in all the
" passenger trains of the Railway Company and over
" its entire line of railway, and on all roads which it
" controls or may hereafter control by ownership,
" lease or otherwise, and also on all passenger trains,
" on which it may by virtue of contracts or running
" arrangements with other roads have a right to use
" such cars, and that it will not contract with any
" other party to run said class of cars on and over
" said lines of road during said period of fifteen
" years" (Record, p. 17).

V.

That at some date prior to December, 1880, the Missouri Pacific Railway Company "acquired and "became the owner of more than a majority of the "stock of the St. Louis, Iron Mountain and Southern "Railway Company," paying therefor by an exchange of capital stock in proportion of three shares of the stock of the Missouri Pacific to four shares of the St. Louis, Iron Mountain and Southern (Record, pp. 5 and 6).

That at some date subsequent to May 4th, 1881, and prior to October, 1881, the Missouri Pacific Railway Company similarly acquired and became the owner of such other shares of said stock, so that the Missouri Pacific "was the holder and owner absolutely in its "corporate capacity of 218,888 shares of the capital "stock of the said St. Louis, Iron Mountain and "Southern Railway Company, while the whole capital "stock of said company was but 220,882 and sixty-six "hundreths shares;" and that of the remaining 1,794 sixty-six hundredths shares, 778 shares were held in their individual right by sundry officers of the Missouri Pacific.

VI.

That certain persons, seven in number, are directors in both companies; that the same persons are respectively president and vice-president of both companies; that the general officers of one company hold corresponding positions in the other; that the two companies have the same general offices, and that the present Board of Directors of the Iron Mountain Company

was elected by the vote of the shares of stock owned by the Missouri Company.

In addition to these averments of fact, the bill contains numerous inferences, deductions and argumentative conclusions, the substance of which is, that the aforesaid purchase of stock by the Missouri Pacific was made with the intent of controlling the management and administration of the Iron Mountain, and of running the two roads as one line and in the interest of the Missouri Pacific; and that the several acts of electing the same seven persons as directors in the two companies, of employing the same persons as general officers, and of occupying the same general offices are simply so many evidences of such intent to control.

The Pullman Company asked for an injunction to restrain the defendants, upon the *subsequent* termination of its 1871 contract with the Iron Mountain Company, from refusiug to permit the complainant to continue to operate its cars upon the Iron Mountain road; and upon the ground, that the Missouri Pacific Company had obtained "control" of the Iron Mountain road within the meaning of the 1877 contract with the Missouri Pacific.

The injunction was refused on demurrer to the bill.

ARGUMENT.

There are but two points in this case, viz.:

1st. As to the construction of the 1877 contract between the complainant and the Missouri Pacific Railway Company.

2d. As to the jurisdiction of a court of equity to grant the relief prayed for, assuming the complainant's construction of the contract to be correct.

I.

The Construction of the Contract.

The argument of appellant intermingles and fails to distinguish between the facts well pleaded in the bill and which are admitted by the demurrer, and the argumentative conclusions, inferences and understandings of the pleader, and which the demurrer does not admit. The *facts* conceded by the demurrer are the ownership of the majority of the stock of the Iron Mountain by the Missouri Pacific Company and the identity of certain directors, general officers and offices. *The argumentative conclusions and understandings* sought to be deduced therefrom by the appellant and which are *not* admitted by the demurrer are, that the apparent autonomy of the Iron Mountain is a fiction, and that all administrative authority over it is actually exercised by the Missouri Pacific. For instance, the Court will find upon page 9 of appellant's brief this statement:

"But the bill which presents in its averments the
"facts of this record shows, as a part of the contract
"between the Iron Mountain stockholders and direct-
"ors and the Missouri Pacific for the transfer of the
"management of this road, a provision that the stock
"of the Iron Mountain acquired by the Missouri Pa-
"cific 'should be *retained*, held *and used* by it *to con-*
"'*trol* the franchises, property and business of the *said*
"'*St. Louis, Iron Mountain and Southern Railway*
"'Company in pursuance and execution of the pur-

" ' poses aforesaid *through the authority of the Board of*
" ' *Directors* of the Missouri Pacific. The stock thereof
" ' is held *in trust* for a specific *use*, and the control is
" ' as stable as if it were by a lease or consolidation." '

But the above quotation was taken from the Bill (Record p. 6), the exact language therein being:

" And *it was understood* that as a part of said ar-
" rangement the stock" * * * "should be re-
" tained " and so on as quoted in the appellant's argument. There is a wide variance between the *understanding* of an agreement and the *facts* of the agreement, when a case turns upon the admissions of a demurrer. Counsel begs the whole question when he assumes as a conceded fact a recital in the bill, which was asserted therein, and which could therein only be asserted, as a *deduction* from the *fact* of the exchange of stock, &c.

" A demurrer to a bill in equity admits only facts
" well pleaded in the bill; not averments of conclu-
" sions of law, nor as to construction of documents, or
" parol agreements, or understandings inconsistent
" with the written contract alleged in the bill."

Dillon vs. Barnard, 1 Holmes (C. C. Report), 386.
Same vs. Same, 21 Wallace, 437.
1 Dan'l. Ch. Pr. (12th Ed.) pp. 314, 315, 326.

" On a bill in equity to enforce rights, depending on
" the construction of a written contract set forth in the
" bill, the construction alleged, if not the true one, is
" not admitted by demurrer."

Lea vs. Robeson, 12 Gray, 280.

See also

Bonnell vs. Griswold, 68 N. Y., 294.
Baker vs. Booker, 6 Price, 381.

East India Co. vs. Henchman, 1 Vesey Jr., 289.
Ex Parte Symes, 11 Vesey Jr., 523.
Lloyd vs. Passingham, 16 Vesey Jr., 64.
Commercial Bank vs. Buckner, 20 How., 108.
Redmond vs. Dickerson, 1 Stockton (9 N. J. Eq.), 507.
Niles vs. Andrews, 5 How. (Miss.), 365.
Merrell vs. Plainfielt, 45 N. H., 126.
Bryant & Co. vs. Spinell, 4 Jones Eq., 27.
Bliss on Code Pleading, Sec. 418.

The bill of complaint violates this fundamental rule of pleading, because it alleges a contract and then proceeds to give its conclusions as to the legal effect and construction of its terms. Our demurrer does not admit the truth or correctness of any such argumentative conclusions.

The real question and the only question upon the merits is, whether the ownership, when the Bill was filed, by the Missouri Pacific of a majority of the capital stock of the Iron Mountain, and the identity of certain directors, general officers and general offices of the two companies, brings the Iron Mountain under the "*control*" of the Missouri Pacific within the meaning of the 1877 contract?

That contract was made between complainant and the Missouri Pacific Company. The Iron Mountain Railroad Company then was, and now is, a separate and entirely distinct corporation, having all the powers and duties of a railroad company under its charter, one of which is the power and duty to operate and control its road. The stockholders do not own the road, nor any property belonging to the corporation. So long

as the corporation exists, all the property belongs to it. When the corporation is dissolved, the stockholders, after the payment of the debts of the corporation, have the right to divide the property among themselves. The majority of stockholders even in that case do not own the property; they are only part owners. This is elementary law.

No doctrine of the law is better settled than that the stockholders as such and so far as the property is concerned, have only the right to their portion of the dividends arising from the management of the property, and the right to divide the property among themselves after a dissolution of the corporation.

They are, therefore, not the owners of the road. Neither have they "control" of the road; the road might be owned by one company and controlled by another, but the company is a person in law, is still in existence, and as such has the control of its own property unless it has leased it or sold it to another person or corporation. This is the legal status of the property, and this being so, can a court of equity step in and say that the corporation is dissolved, that it will not be recognized as a separate person in law, that as a consequence of the dissolution the property is the property of the stockholders? Can it go even further and say that the property—the road--belongs not to all the stockholders, but to a majority of the stockholders?

The Missouri Pacific Railway Company is simply a stockholder, and as such has neither the ownership nor the control of the Iron Mountain Railroad Company. There is no fraud alleged in the case—it is simply a question of the legal status of the two com-

panies, and the contract must be interpreted in the light of the legal rules that apply to such a condition of things.

Under such legal rules, as uniformly recognized and applied, the Board of Directors of the St. Louis, Iron Mountain and Southern Railway would alone have "control" over the management and operation of that road. As the corporation is only a legal existence and not a living personality, the directors become practically the corporation itself, and exercise an original, rather than a delegated authority.

> Pierce on Railroads (2d Ed.), 32.
> U. S. vs. U. P. R. R. Co., 98 U. S., 611.
> Pacific R. R. vs. Ketchum, 101 U. S., 296.
> Railway Co. vs. Alling, 99 U. S., 472.

In the Alling case the Denver and Rio Grande Railway Company were before this Court as appellants, and the Atchison, Topeka and Santa Fé Company moved this Court that it be allowed to intervene and take charge of these suits in the name of the Denver Company, and appear by its solicitor, on behalf of the appellants, that it may give consent of record to the dismissal of the appeals. The Denver Company resisted this motion. Upon the hearing thereof by this Court, it appeared that the Denver Company had issued 85,000 shares of stock, of which the Atchison Company claimed to own a majority. It was also shown that the Board of Directors of the Denver Company had by resolution instructed the president and attorneys of that company to resist the aforesaid motion. This raised a direct issue between the power of a majority of the stockholders and the power of the

Board of Directors, to control the management of the company in its conduct of the suit. And thereupon this Court held:

"The present appeals are being prosecuted to final "judgment by order of the directors or trustees of the "appellant corporation. To them, by law, is com- "mitted the management of the property and concerns "of the corporation. In all litigation involving the "action of the corporation they are its representatives "in Court. In the discharge of their duties they rep- "resent, not only the stockholders, but the bond- "holders and creditors of the company." * * *

And the motion to intervene was denied.

Nor does the alleged identity of the president and vice-president and of certain general officers of the two companies prove that the Iron Mountain road is "controlled" by the Missouri Pacific. The converse of that proposition would be equally logical from the same same premises, viz., that the Missouri Pacific is "controlled" by the Iron Mountain. There is as much reason and consistency in the one position as in the other. Such president and vice-president, under the "control" of their respective Boards of Directors, conduct the business of both railroads through entirely different officers and employees, except where the latter occupy similar positions in both companies. In these cases all their acts as to each road and its business are separate and distinct.

Indeed, counsel for appellant is obliged to admit (Brief, p. 29) that:

"It *is* the law that the administration of a railroad "in its normal condition belongs with its Board of "Directors, and the executive officers and agents whom "the board appoints. It *is* true that the law does not "contemplate that stockholders will ordinarily exer- "cise this executive control."

That is sound law. Its application should *settle* this case. It is the immediate and executive control of a railroad, which is recognized in all text-books and in every adjudicated case. It is that character of "control" which alone was contemplated by the contract between the Pullman Company and the Missouri Pacific Company. Neither party to the contract had in view that indirect form of control by way of electing directors and otherwise, which might and would be ultimately exercised by the stockholders. Nor is the principle affected by the number of such stockholders, whether one or a million of separate owners of stock; nor by the recognized right of stockholders to be heard in Court in a proper proceeding against the directors for a breach of trust.

Where would the Court draw the line of its ability and power to follow the ownership of stock at any given date, if it went behind the executive control of the Board of Directors and its subordinate officers and agents, and gave effect to the ultimate power of control necessarily vested in the stockholders? The Missouri Pacific has as clear power to *sell* the stock of the Iron Mountain as it had to *purchase* it. As the Court below well said: "Before the decree could be "executed in this case, the stock of the Iron Mountain "Company may pass to other hands." Suppose that the stock was so sold, would the purchasers take *cum onere?* Would their control of the Iron Mountain road, through such purchase and ownership of its stock, be loaded with the obligation of this Pullman contract with the Missouri Pacific? And suppose that the Iron Mountain Company, after its stock had been sold by the Missouri Pacific, should in turn purchase

its stock of the Missouri Pacific, would this question of "control" still follow the change of ownership? In short, how far would the Court be obliged to pursue the kaleidescopal transitions of the daily transactions of the stock market?

Or if the Court could see its way to abandon the *antiguæ viæ* of the law so as to follow appellant's counsel in an illusory chase after the assumed "power behind the throne," where would it stop? He asks you to abandon the recognized authority of the Boards of Directors, and to substitute therefor "common phrases in public speech," "notorious facts," and like popular declarations of an alleged secret but practical control in some individual owner of railroad property "that reaching to the smallest details of management, "puts him on a throne of social power that is greater "among sixty millions of people than that of all its de-"partments of government combined" (Appellant's Brief, p. 26).

Again, the covenant of the Pullman Company with the Missouri Pacific Company was to furnish cars "to be used by the Missouri Pacific Railway Company over its line of railway and [*by it*] on and over all lines of railway which it controls by ownership, lease or otherwise" (Art. first, p. 15, Record).

The covenant of the Railway Company (Record, p. 16, Art. seventh) was to haul Pullman cars on the passenger trains on its own line of road, and [itself to haul the same] on all roads it controls by ownership, lease or otherwise."

The word "otherwise" is *ejusdem generis* with "ownership" and "lease." General words following an enumeration of particulars have their generality limited by the preceding particular enumeration. Where a road is "owned" or "leased," the owner or lessee is in the actual possession and actual operation of the road. To roads thus owned or leased by the Missouri Pacific, *i. e., to roads worked by it*, the Pullman Company agreed to furnish its cars. Its agreement was to furnish cars to the Missouri Pacific Company, to *be hauled by it*, whether on its own roads or roads leased or otherwise controlled by it so that it (the Missouri Pacific) could haul them thereon. The obligation of the Missouri Pacific was reciprocal and in the same language, viz., that it would haul the Pullman cars, *not on roads which it did not own or operate*, but on its own road and roads controlled by lease, or in such other way as would give the Missouri Pacific Company the right to run and haul Pullman cars thereon. The Iron Mountain road is not owned by the Missouri Pacific Company. Nor is it leased by it. Nor is it operated by it. It has its own directors, officers and management. *It is operated by itself.* The Missouri Pacific, as a corporation, cannot haul or use the Pullman cars over or on the Iron Mountain road. It is clear, therefore, that the case stated in the Bill is one wholly without the language or purpose of the Contract of 1877.

II.

The Remedy.

If complainant has any cause of action, it is for a breach of the contract. The remedy therefor is at law and not in equity. The only question involved in the case is whether the Iron Mountain road can be brought within the proper construction of the language of the Missouri Pacific contract; and the only alleged fact, upon which it is claimed to be so brought, is that the Missouri Pacific Company is averred to own a majority of the capital stock of the Iron Mountain Railroad Company. But no equitable questions are therein involved. Only legal questions are to be determined. Ever since the Judiciary act there has been a distinct provision that a Federal court of equity shall not take jurisdiction of cases where there is ~~no~~ an adequate remedy at law.

There is no complaint that any contract had been broken. No bill has been filed to compel a specific performance. *It could not have* been filed, because there had been no breach when this suit was commenced. Nor would the complainant dare to file such bill for specific performance. The contract was an entirety, and complainant must have asked for the enforcement of its provisions as a whole. It must have asked the interposition of chancery to not only assure the continued operation of their cars upon the Iron Mountain road, but to secure such operation to the exclusion of right in any other party to run similar class of cars on said road (Clause 12, Contract, Record, p.

17). And they must have so asked directly in the face of the only pretense upon which they put their claim to be entitled to the interposition of equity jurisdiction, viz.: the supposed authority of the Telegraph and Express cases.

The complaint is, that the Missouri Pacific Railway Company is *about* to break its contract, and that the complainant is without adequate remedy at law. But there is no occasion for a remedy until the contract is broken. When it is broken, the remedy at law is ample, there being no averment tending to show that from insolvency of defendant or otherwise, the complainant would not in such case have an adequate remedy at law.

The Missouri Pacific may sell, and is at full liberty to sell its stock in the Iron Mountain Company without any violation of the rights of the complainant. On what principle can an injunction be granted in such case? Could the Court decree that the Missouri Pacific should not enjoy the ordinary incidents of ownership, and hence enjoin the sale of its stock? *The complainant is not obliged to run its cars over the Iron Mountain road.* It may cease to do so at any time, unless it is proposed to make a new contract by force of some decree or order of this Court. *Such unilateral, contingent rights, ephemeral in their nature and determinable at the will of one of the parties, are not specifically enforceable in a court of equity or protected by injunction.*

Marble Company vs. Ripley, 10 Wallace, 339.

Bispham's Eq., Section 377, and cases cited.

The writ of injunction in such a case is merely an *incident* of equity jurisdiction, which jurisdiction must rest upon some known and established ground of equity, such as fraud, trust, specific performance, &c.

This is not the case of an injunction to restrain breach of *negative* covenants.

And whilst we cannot perceive in this case any recognized grounds for equity intervention, we submit with great deference to opposing counsel, that his suggestion of such assumed grounds is more ingenious as an argument than sound as a legal proposition. He says that the remedy at law is insufficient, because the fares are such little things; that every fare collected would be a breach of the contract, and the basis of a separate recovery; and that hence there would result such a multiplicity of suits as to practically destroy the remedy at law. Is this not an imaginary rather than an actual result of a breach or many breaches of the contract? The Pullman Company have been operating their cars for ten years upon the Iron Mountain road, and it certainly has within its control the means of striking a fair annual balance, which would be recoverable in one suit.

Nor can we discover the probability of irreparable loss to the Pullman Company by reason of extraordinary preparations and expectations on its part dependent upon the continuance of its privileges over the Iron Mountain road. The Court will readily perceive that the complainant (Pullman Company) operated its cars over the Iron Mountain road from November 20, 1871, to December 15, 1881, under its contracts with the Iron Mountain Company. That carried the service down to a date *subsequent* to the filing of complainant's bill.

There is absolutely nothing in the averments of the bill to show, but very much to show the precise contrary, that until such expiration of its Iron Mountain contract in 1881, the Pullman Company ever claimed or thought of claiming any rights over the Iron Mountain road by virtue of its 1877 contract with the Missouri Pacific Company. Whatever may prove to be its legal consequences, it scarcely admits of doubt that the contract with the Missouri Pacific made during the existence and continuing operation of a similar contract with the Iron Mountain, did not *then* contemplate the granting of such rights to the Pullman Company over the Iron Mountain road as are now claimed under its terms. Such a construction or claim was never thought of by complainant until its contract with the Iron Mountain Company was about to expire, and it originated such theory so as to perpetuate its monopoly of the operation of sleeping and drawing-room cars over the Iron Mountain road. Whilst that does not change the *obligations* of any existing contract, it does eliminate from the case the features of special and peculiar damage, upon the averment of which complainant mainly puts its appeal to chancery remedies. It could not suffer immediate and irreparable loss from the refusal of the Missouri Pacific to then *commence* the performance of contract obligations alleged to have existed since 1877, but which were never even thought of being called into operation until 1881.

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